88-710

No.

Supreme Court, U.S.
FILED
OCT 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

ORKIN EXTERMINATING COMPANY, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Does Section 5(a) of the Federal Trade Commission Act empower the Commission to find that a simple breach of a consumer form contract is an "unfair" act or practice even though (a) there was no intent to cause consumer injury, (b) there was no deceptive or fraudulent conduct, and (c) the action complained of was taken in good faith reliance upon the advice of counsel?

RULE 28.1 LIST

Rollins, Inc. is the parent company of petitioner Orkin Exterminating Company, Inc. Dettelbach Pesticide Corporation, Kinro Advertising Company, and Orkin S. A. de C. V. are subsidiaries of Orkin Exterminating Company, Inc.

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FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Orkin Exterminating Company, Inc. ("Orkin") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Final Order of the Federal Trade Commission, which includes the Initial Decision of the Administrative Law Judge, is reported at 108 F.T.C. 263 (1986) and reprinted as Appendix A. The corrected opinion of the United States Court of Appeals for the Eleventh Circuit affirming the Final Order is reported at 849 F.2d 1354 (11th Cir. 1988) and reprinted as Appendix B.

JURISDICTION

The corrected judgment of the court of appeals was entered on July 15, 1988. A timely Suggestion for Rehearing In Banc was denied on September 19, 1988, in an order that is reprinted as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1985).

STATUTE INVOLVED

Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1985), is set forth in pertinent part in Appendix D.

STATEMENT OF THE CASE

1. Statement of Facts

Orkin is a national pest control and exterminating company. 108 F.T.C. at 342. This litigation involves form contracts that it used for its termite and moisture control services between January 1966 and February 1975 (the "pre-1975 contracts").

The pre-1975 contracts provide for an initial treatment of covered property for a specified price and guaranteed protection thereafter, through inspections and retreatment or repair, for an annual renewal fee. *Id.* at 343-44. The customer has a guaranteed right to renew the termite or moisture protection each year for the lifetime of the treated structure without ever paying another treatment fee, and this guaranty may be assumed by later owners. *Id.* at 277.

The pre-1975 contracts state that they are automatically terminated in the event of a structural modification unless the customer permits Orkin to reinspect the premises, undertake additional treatment, and/or adjust the annual renewal fees. The contracts are silent as to whether the annual renewal fees can be increased under other circumstances. *Id.* at 344.

In late 1978, Orkin began to consider raising the renewal fees of all its termite and moisture control contracts in response to dramatic and unanticipated inflation in the cost of providing these services. *Id.* at 345. Orkin was advised by independent outside counsel that the pre-1975 contracts were renewable for an indefinite duration and hence could be terminated by Orkin with notice after a reasonable period of time. *Id.* at 346.

Relying in good faith on this opinion and the separate concurring opinion of the general counsel of its parent company, Rollins, Inc., in 1980 Orkin increased the annual fees on the pre-1975 contracts by 40% or up to $25.00, whichever was greater. *Id.* at 347. The average increase was $10.84, which raised the average annual fee to $34.37. By comparison, Orkin's average cost of providing termite renewal services had risen to $20.22 per account in 1980, largely due to an over 300% increase in the cost of the primary chemicals since 1967, and by 1984 its average termite renewal cost was up to $37.28 per account. R219. There has been no other increase in the renewal fees on the pre-1975 contracts. 108 F.T.C. at 349.

Notice of the increase was sent to approximately 207,000 holders of pre-1975 contracts (the "pre-1975 customers"). *Id.* at 347. According to Orkin's records, as of May 1981 it had received complaints about the increase

from less than 2% of the affected customers. *Id.* at 284. The annual cancellation rate on Orkin's pre-1975 contracts following the 1980 increase was only around 5%, whereas in 1980 it had experienced annual cancellation rates of 5.8% on all termite contracts and 5.2% on contracts that were in force for over five years. *Id.* at 292, 310. A number of pre-1975 customers testified that they did not believe at the time they contracted with Orkin that their contracts provided for a fixed annual renewal fee. *See, e.g.*, R245-247 ¶¶ 8, 9; R248-250 ¶¶ 8-10; R251-253 ¶¶ 8-10; R254-257 ¶¶ 8-10; R258-261 ¶¶ 8-10.

For approximately six months in 1968, Orkin used an advertising program for its termite control contracts called "Orkin 12." 108 F.T.C. at 345. This promotion included a pamphlet stating that the annual renewal fee *"is very modest and never increases."* *Id.* (emphasis in original). In light of the "Orkin 12" program, Orkin rescinded the 1980 increase in annual renewal fees of all pre-1975 customers who entered into their contracts at any time in 1968, whether or not they ever saw or heard of the foregoing pamphlet or statement, and gave these customers full credit for increased amounts already paid. *Id.* at 348-49.

In addition, Orkin rolled back the annual renewal fees of all other pre-1975 customers who objected to the 1980 increase on the ground that, at the time they contracted with Orkin, they thought that their annual renewal fee would not increase. *Id.* This "accommodation program" was developed and implemented by Orkin within months of its first notices to pre-1975 customers of the increased annual renewal fees, and by August 1984 some 5,700 pre-1975 customers had taken full advantage of it. *Id.* at 349.

2. Proceedings Below

In May 1984 the Federal Trade Commission (the "Commission") issued an Administrative Complaint charging Orkin with committing an "unfair act or practice" in violation of Section 5(a) of the Federal Trade Commission Act (the "FTCA") by raising the renewal fees on the pre-1975 contracts. The Commission did not contend that this alleged breach of contract involved either fraud or deception.

Complaint Counsel moved for summary judgment, arguing that the fee increase breached the pre-1975 contracts and violated Section 5(a) as a matter of law. Orkin cross-moved for summary judgment on the ground that the alleged breach of contract, even if proven, was not actionable under Section 5(a). Orkin also opposed Complaint Counsel's motion because there were disputed issues of material fact and application of fact to law that precluded summary judgment in favor of Complaint Counsel.

The administrative law judge entered summary judgment against Orkin as to the whole case. The Commission affirmed this Initial Decision in a Final Order (the "Final Order") which, *inter alia*, prohibited Orkin from charging or collecting the amount of the fee increase from customers still holding pre-1975 contracts.[1]

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1. Section 3.24(a)(2) of the Commission's Rules of Practice, which governs summary judgment in this proceeding, is based on Federal Rule of Civil Procedure 56, and cases interpreting Rule 56 are "controlling" as to its interpretation. *E.g., Hearst Corp.*, 80 F.T.C. 1011, 1014-15 (1972); *see also* 108 F.T.C. at 350 n.11. Thus, the Commission was required to assume that the evidence presented by Orkin is true, to give Orkin the benefit of all reasonable inferences that can be drawn from the evidence, and not to resolve any disputed issues of fact by weighing the evidence.

(Continued on following page)

Orkin appealed to the Eleventh Circuit, *see* 15 U.S.C. § 45(c) (1985), on two principal grounds. First, Orkin argued that there were material issues of fact for trial as to (i) whether it breached the pre-1975 contracts, and (ii) whether this alleged breach violated Section 5(a). Second, Orkin contended that the Commission's determination that a non-fraudulent, non-deceptive alleged breach of contract violated Section 5(a) exceeded the Commission's authority under both the FTCA and the Administrative Procedure Act. On April 19, 1988, the Eleventh Circuit issued its opinion affirming the Final Order in its entirety.

Orkin timely petitioned for rehearing or, alternatively, suggested rehearing *in banc*. The Commission also petitioned for rehearing of the denial of its motion for an injunction *pendente lite*. On July 15, 1988 the Eleventh Circuit issued a corrected opinion again upholding the Final Order in all respects and granting the Commission's motion for an injunction *pendente lite*.

Orkin timely renewed its previous Suggestion for Rehearing *In Banc*. The Eleventh Circuit denied this request in an Order issued September 19, 1988.

Footnote continued—

E.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 255 (1986); *Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296-99 (11th Cir. 1983). Orkin submits that both the Commission and the Eleventh Circuit disregarded these fundamental summary judgment principles in finding that Orkin violated Section 5(a) as a matter of law on the record below.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's "Unprecedented" Decision Exposes All Businesses Which Use Consumer Form Contracts to the Risk of Liability Under Section 5(a) of the FTCA for a Simple Breach of Those Contracts and Thereby Expands Section 5(a) Beyond the Scope Intended by Congress

The Eleventh Circuit assumed that Orkin's decision to raise the annual renewal fees of the pre-1975 contracts was not deceptive or fraudulent; was not willful; and was not intended to cause consumer injury; and was arrived at in good faith upon the advice of counsel. 849 F.2d at 1359, 1368. Nonetheless, the court held that Orkin violated Section 5(a) of the FTCA as a matter of law. This result, which the Eleventh Circuit conceded "may be 'unprecedented,'" *id.* at 1368, is contrary to both the Commission's own stated position and any reasonable construction of Section 5(a). If allowed to stand, it would substantially federalize the interpretation and enforcement of all consumer form contracts in direct contravention of Congress' intentions in authorizing the Commission to remedy truly "unfair acts or practices."

As the Commission itself recognized in the Final Order, not every breach of contract is, or should be, actionable under Section 5(a). *See* 108 F.T.C. at 361 ("We need not and do not find that every breach of contract subjects the breaching party to liability under Section 5."). Additional circumstances must be proven to elevate an ordinary breach of contract into an unfair trade practice.

Orkin firmly believes, and argued to the Eleventh Circuit, that the Commission purported to find this "something more" in (i) Orkin's conduct and (ii) the Commission's three-pronged consumer injury test.[2] The Louisiana Court of Appeals has joined Orkin in this interpretation of the Final Order. *See Louisiana ex rel. Guste v. Orkin Exterminating Co.*, 528 So.2d 198, 202 (La. Ct. App. 1988). Nevertheless, the Eleventh Circuit held that the Commission's repeated emphasis on Orkin's conduct in the Final Order was effectively dicta, and that the Commission relied solely on its consumer injury test to distinguish Orkin's alleged breach of contract from "garden variety" breaches that are not within the ambit of Section 5(a). *See* 849 F.2d at 1366-67.

If the Commission sought to draw this "line" only with its consumer injury test, which Orkin denies, it totally failed. In practice, virtually every breach of a consumer form contract will satisfy all three prongs of the test. Because form contracts are used in multiple transactions, breach of a consumer form contract would almost always cause *substantial injury* in the aggregate, which is the measure applied by the Commission and approved by the Eleventh Circuit. Nor is it likely that the Commission will ever find any *countervailing benefits* to consumers or competitors from any breach of a

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2. The Commission defines its "consumer unfairness jurisdiction" in terms of a tripartite test of unjustified consumer injury: "It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), *reprinted in* H.R. Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 33-40 (1983), at 36. *See* 849 F.2d at 1364; *American Financial Services Ass'n v. FTC*, 767 F.2d 957, 971 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1101 (1986).

consumer form contract. And if, as in this case, the Commission closes its eyes to both uncontested record evidence and common sense proof of the availability of comparable products or services elsewhere, adequate state law remedies, and alternative dispute resolution programs offered by the affected company, no breach of a consumer form contract will ever be held to be *reasonably avoidable* by consumers.

The Commission's consumer injury test is therefore no test at all for identifying those breaches of consumer form contracts, if any, that are properly actionable under Section 5(a). Rather, every such breach risks investigation and intervention by the Commission in its unfettered discretion. This potential dragnet is squarely at odds with the Commission's own admission that "not every breach of contract subjects the breaching party to liability under Section 5." 108 F.T.C. at 361.

Further, no detailed review of the legislative history or case law of Section 5(a) is necessary to confirm that it was not enacted by Congress to confer a roving jurisdiction on the Commission to displace state contract law whenever consumer form contracts are involved. Yet the Eleventh Circuit's decision exposes all businesses which use consumer form contracts to the threat of prosecution by the Commission and severe penalties under federal law for any breach of these contracts even where, as here, there is no claim of fraud, deception, or intentional wrongdoing and the alleged breach was done in good faith reliance on the advice of counsel.[3]

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3. Once the Commission has issued a final cease and desist order against a person, partnership, or corporation for engaging

(Continued on following page)

Neither law nor logic justifies this far-reaching expansion of Section 5(a), especially when retroactively imposed on a single company instead of prospectively developed and applied across the board through a rule-making proceeding. *Cf. American Financial Services Ass'n v. FTC*, 767 F.2d 957 (D.C. Cir. 1985) (upholds exercise of the Commission's "unfairness" jurisdiction to promulgate rules regulating credit practices), *cert. denied*, 475 U.S. 1011 (1986). Orkin accordingly urges that this petition for a writ of certiorari be granted to review and reverse the Eleventh Circuit's improper and unwise decision on this important question of federal law that has not been, but should be, settled by this Court.

Footnote continued—

in an "unfair act or practice" in violation of Section 5(a), it may seek additional relief against such entity in a separate "consumer redress" suit in federal or state court if "the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent." 15 U.S.C. § 57b(a)(2) (Supp. 1988). This relief can include, but is not limited to, rescission or reformation of contracts, refund of money or return of property, or payment of damages. *Id.* § 57b(b). Even though the Commission has never alleged, let alone tried to prove, that Orkin's actions in raising the annual renewal fees on the pre-1975 actions were in any way fraudulent or deceptive, the Commission still stated in its Notice of Contemplated Relief in this proceeding that it might seek consumer redress against Orkin "in the form of notice, repairs, restitution and/or refunds and such other types of relief as are set forth in [§ 57b(b)]." R184.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari ought to be granted and the Eleventh Circuit's decision reversed and remanded with instructions that the Final Order be vacated and remanded to the Commission for further findings of fact and/or trial on the merits.

Respectfully submitted,

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Appendix D—Relevant Statute A252

APPENDIX A

In the Matter of

ORKIN EXTERMINATING COMPANY, INC.

Final Order, Opinion, Etc., in Regard to Alleged Violation of Sec. 5 of the Federal Trade Commission Act

Docket 9176. Complaint, May 8, 1984—Final Order, Dec. 15, 1986

This Final Order requires an Atlanta, Georgia-based exterminating company to roll back the "lifetime" annual renewal fees on contracts signed prior to 1975 to the fixed fee established prior to a 1980 raise in price. Respondent is also required to notify each affected customer.

Appearances

For the Commission: *Katharine B. Alphin* and *Chris M. Couillou.*

For the respondents: *John C. Staton, Michael E. Ross* and *Sylvia M. King, King & Spaulding,* Atlanta, Ga.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Orkin Exterminating Company, Inc., a corporation, has violated the provisions of Section 5(a) of the Federal Trade Commission Act, and it appearing to the Commission that a

proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph 1. Respondent Orkin Exterminating Company, Inc., is a Delaware corporation with its principal place of business located at 2170 Piedmont Road, N.E., Atlanta, Georgia.

Par. 2. Respondent maintains, and at all times mentioned in this complaint has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

Par. 3. Among other services, respondent provides to individuals and businesses ("consumers") services to treat houses, buildings, and other structures ("structures") in order to destroy and protect against termites and other wood-infesting organisms ("termite-control services").

Par. 4. In numerous instances, in the course of advertising, promoting, selling, and performing its termite-control services, respondent agreed for the life of the structure to reinspect the consumer's structure annually and, if necessary, to either retreat or retreat and repair the structure, provided the consumer paid a specified fixed annual renewal fee.

Par. 5. In contradiction of the agreements described in Paragraph Four, in numerous instances beginning in [2] 1980 and continuing to the present, respondent has raised, or has attempted to raise, the agreed-upon annual renewal fee for its termite-control services.

Par. 6. Respondent's actions described above have thus caused substantial and ongoing injury to respondent's

customers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers.

Par. 7. Respondent's acts and practices as herein alleged were and are to the prejudice and injury of the public and constitute unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

APRIL 22, 1985

PRELIMINARY STATEMENT

The complaint herein issued on May 8, 1984, charging Orkin Exterminating Company, Inc., (hereinafter "Orkin") with violation of Section 5(a) of the Federal Trade Commission Act. The complaint alleges that respondent Orkin provides to individuals and businesses services to treat houses, buildings, and other structures in order to destroy and protect against termites and other wood-infesting organisms. In numerous instances, in the course of advertising, promoting, selling and performing its termite-control services, Orkin agreed to reinspect the consumer's structure annually for the life of the structure and, if necessary, to either retreat or retreat and repair the structure, provided the consumer paid a specified fixed annual renewal fee.

In contradiction of the agreements described above, in numerous instances beginning in 1980 and continuing to the present, Orkin has raised, or has attempted to raise, the agreed-upon annual renewal fee for its termite-

control services. It is alleged that Orkin's actions in raising or attempting to raise [2] the fixed annual renewal fee have caused substantial and ongoing injury to Orkin's customers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and were and are to the prejudice and injury of the public and constitute unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Orkin filed an answer on June 18, 1984, generally denying the charging allegations of the complaint and asserting eleven defenses, including: a claim that the complaint fails to state a violation of law; that the Commission issued the complaint without reason to believe that Orkin had violated the law, that the Commission violated its own policy set forth in its *Operating Manual* to defer to state and local authorities to obtain corrective action in matters primarily intrastate in nature or effect; that the Commission lacks subject matter jurisdiction over the complaint allegations; that the acts and practices of Orkin as alleged in the complaint were and are not to the prejudice and injury of the public and do not constitute unfair acts or practices in or affecting commerce; that the acts and practices alleged to have been committed by Orkin have not caused substantial and ongoing injury to Orkin's customers; that the complaint is barred by applicable statute(s) of limitations; that the alleged unlawful acts and practices have been encouraged, approved, and/or compelled by federal and state regulatory authorities and law and are therefore exempt from the Federal Trade Commission Act; that the consumers alleged to have been injured by Orkin's acts and practices have recognized, ac-

cepted, and acquiesced to the alleged misconduct under doctrines of waiver, estoppel, ratification, accord and satisfaction, limitations, and latches; and that the relief proposed is inappropriate, not in the public interest, and is not or would not be authorized by law.

In response to a motion by complaint counsel, not objected to by respondent Orkin, Paragraph 3 of the complaint was amended to add "and wood decay" as an additional contract service falling within the category of services alleged in the complaint as having the fixed annual renewal fee raised in contradiction to agreements with consumers. (Order Amending Complaint, November 15, 1984) Also, in response to a motion by complaint counsel, respondent Orkin's Second Defense (challenging the Commission's "reason to believe" Orkin had violated Section 5(a) of the Federal Trade Commission Act), Third Defense (stating that the Commission had violated its policy stated in the Operating Manual to defer to state and local authorities to obtain corrective action in matters primarily intrastate in nature and effect), and the introductory paragraph to Orkin's Twelfth Defense (challenging the Commission's "reason to believe" and "public interest" determinations in issuing the complaint) were stricken. (Order Ruling On Complaint Counsel's Motion To Strike . . . , August 7, 1984) [3]

A prehearing conference was held on August 9, 1984. At the conference Orkin's counsel was urged to stipulate to the commerce allegations of the complaint. (Prehearing Transcript, pp. 11-14, 60) Thereafter, during the course of pretrial discovery, Orkin stipulated that it maintains, and at all times mentioned in the complaint has maintained, a substantial course of business, including the acts and practices as set forth in the complaint, in or affecting com-

merce, as "commerce" is defined in the Federal Trade Commission Act. (Finding 3, *infra*)

By motion dated January 30, 1985, complaint counsel has moved for summary decision as to all issues to be resolved in this proceeding. Complaint counsel's motion is supported by the pleadings heretofore filed in this proceeding, depositions of respondent's officials, documents created, sent or received by respondent during the course of its business operations and received by complaint counsel from respondent during the investigation which preceded issuance of the complaint herein or during pretrial discovery, and some few third party documents received by complaint counsel from state agencies and consumers which have been adequately authenticated by complaint counsel for purposes of ruling on this motion.

Respondent has filed an opposition, dated March 1, 1985, to complaint counsel's motion. Respondent has also filed a motion for summary decision in its favor, and has submitted affidavits and depositions from its officials, competitors, consumers, one economic expert, and certain of its documents. Respondent also has submitted statements of material fact which it contends either directly contravene complaint counsel's findings of fact, or raise genuine issues of inference and legal significance that foreclose any entry of summary decision in favor of complaint counsel.

Respondent, additionally, has filed a supplemental brief, dated March 8, 1985, and a reply and answer brief, dated March 27, 1985, which additional briefing is or has been authorized. Complaint counsel filed a reply to respondent's opposition and motion on March 16, 1985, which also was authorized.

Respondent's submissions and arguments contend that: Orkin's alleged breach of contract is not actionable under Section 5 of the Federal Trade Commission Act because it is at most a non-deceptive alleged breach of a putative contractual promise as to which the agreements in question are entirely silent; that Orkin's contracts in issue do not provide for fixed annual renewal premiums but are of an indefinite duration and hence may be terminated after a reasonable period of time; and, that the alleged breach of contracts are not an "unfair act or practice" in violation of Section 5 because there is no unjustified consumer injury. Respondent also contends that any consideration of complaint counsel's requested relief is premature. [4]

Section 3.24 of the Commission's Rules of Practice authorizes any party to move with or without supporting affidavits for a summary decision in his favor upon all or any part of the issues being adjudicated. The granting of such a motion is authorized where the affidavits and other evidence relied upon "show that there is no genuine issue as to any material fact and that the moving party is entitled to such a decision as a matter of law." (Section 3.24(a)(2)) Any such decision shall constitute the initial decision of the Administrative Law Judge.

Section 3.24 closely parallels Rule 56 of the Federal Rules of Civil Procedure. *The Hearst Corporation,* 80 F.T.C. 1011, 1014 (1972) Summary judgment under Rule 56 may be granted only if there is no genuine issue as to any material fact or the inferences to be drawn from the undisputed facts. *United States v. Diebold, Inc.,* 369 U.S. 654 (1962); *Winters v. Highlands Ins.* 569 F.2d 297 (5th Cir. 1978); *Handi Inv. Co. v. Mobil Oil Co.,* 550 F.2d 543 (9th Cir. 1977); *Weiss v. Kay Jewelry Stores, Inc.,* 470 F.2d 1259, 1261-62 (D.C. Cir. 1972) The moving

party has the burden of establishing that no genuine issue of material fact exists; all doubts and inferences are resolved against the movant; and summary judgment is improper if conflicting inferences may be drawn from the same evidence. *Exnicious v. United States,* 563 F.2d 418 (10th Cir. 1977) This same standard has been accepted in Federal Trade Commission proceedings. *The Hearst Corporation, supra; American Medical Association,* Dkt. 9064, slip op. at 5 (Order Denying Motion of Respondent The American Medical Association ("AMA") For Summary Decision Dismissing The Complaint For Lack of Jurisdiction, Apr. 26, 1976) [94 F.T.C. 701 (1979)].

Full consideration has been given to the findings of fact and legal arguments presented by the parties. The Findings of Fact which follow are based on reliable evidence as to which there is no dispute as to its authenticity or genuiness. A careful study of the evidence relied upon by the parties reveals that there is no genuine issue as to any of the material facts to be concluded from such evidence, or as to the relevant inferences which logically can be drawn from such facts. Therefore, summary decision is appropriate.

All motions not previously ruled upon are denied. Based on the evidence presented by the parties hereto in support of and in opposition to motions for summary decision, the following Findings of Fact are without substantial dispute.

I. FINDINGS OF FACT

1. Orkin Exterminating Company, Inc., ("Orkin") is a Delaware corporation with its principal place of business located at 2170 Piedmont Road, N.E., Atlanta,

Georgia. (Complaint, ¶1; Answer, Twelfth Defense, Paragraph 1) Orkin is a wholly-owned [5] subsidiary of Rollins, Inc. (CX 142C) Rollins acquired Orkin on September 10, 1964, (RIR 30)[1] [6]

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1. The following abbreviations are used in citations in this decision:

CX	Complaint counsel's exhibits as listed on complaint counsel's Preliminary Document List and amendments and filed in support of complaint counsel's Motion For Summary Decision.
RX	Respondent's exhibits as listed on its Preliminary Document List and amendments filed in support of respondent's Motion For Summary Decision and in opposition to complaint counsel's Motion For Summary Decision.
RIR	Respondent's Responses to Complaint Counsel's First Set of Interrogatories, response to interrogatory #.
RA	Respondent's Answers and Objections To Counsel's First Request For Admissions, response to request for admission #.
CRA	Complaint counsel's First Request for Admissions, request #.
F	Findings of Fact in this initial decision, finding #.
Respondent's Motion for Access	Respondents motion for Issuance of an Order Requiring Access to Documents, dated June 28, 1984.
(Name) Dep.	Deposition of person identified.
(Name) Dep. Ex.	Exhibit to deposition of person identified.
(Name) Aff.	Affidavit of person identified.

The persons who depositions and affidavits are cited in this decision are identified as follows:

Geiger	Earl Geiger, Vice Chairman of Rollins, Inc. (F 11).

(Continued on following page)

2. Orkin provides pest-control and exterminating services throughout the United States, but mostly in the Southeast. (Respondent's Motion for Access, p. 2) In 1980, Orkin served customers located in 47 states and

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Footnote continued—

Kimbell	Ron Kimbell, Orkin Commercial Branch Manager (Kimbell Dep. p. 4), formerly Director of Customer Services of Rollins, Inc. (F 47).
Raymond	John Raymond, Director of Administrative Operations of Orkin (F 54, 57).
Rollins	Gary W. Rollins, President of Rollins, Inc. (F 38).
Russell	Robert M. Russell, Vice-President of Government Relations of Orkin (F 61).
Schneider	James M. Schneider, General Counsel of Rollins, Inc. (F 55).
Boudreaux	Dr. Kenneth J. Boudreaux, Professor of Economics and Finance, Graduate School of Business, Tulane University.
Bourgeois	Ernest R. Bourgeois, owner and President, Mr. B's Services, Inc.
Childs	Janet Childs, Receivables Audit Supervisor, Orkin.
Edwards	Jack L. Edwards, retired, formerly President, Ja-Roy Exterminating Co., Inc.
Goodman	Bryant G. Goodman, Branch Manager, Orkin.
Hoffman	William S. Hoffman, an Orkin customer.
Hromada	Charles Hromada, Senior Vice President of Technical Services, Terminix International, Inc.
Jones	Joe Jones, Branch Manager, Orkin.
Landry	Ulysse G. Landry, Jr., owner and operator of Houma Pest Control Company, Inc.
Nolen	Truly D. Nolen, founder and President of Truly Nolen of America, Inc.
Terrebonne	Ellis A. Terrebonne, an Orkin customer.
Thompson	Helen R. Thompson, an Orkin customer.

Portions of depositions of some deponents appear in complaint counsel's motion, in Orkin's motion and opposition, and in complaint counsel's answer submissions. [7]

the District of Columbia. (CX 142C) As of September 1, 1980, Orkin operated approximately 294 branch offices and 44 district offices. (RIR 32) Branch offices are supervised by the district offices. (CX 142Z9; Russell Dep. p. 9; Raymond Dep. p. 32)

3. Orkin has stipulated that it maintains, and at all times mentioned in the complaint has maintained, a substantial course of business, including the acts and practices as set forth in the complaint, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. (Letter to Katharine B. Alphin from Michael Eric Ross dated August 17, 1984, at paragraph 10; one page letter to Katharine B. Alphin from Michael Eric Ross dated August 24, 1984; RIR 66; *compare* letter to John C. Staton, Jr. from Katharine B. Alphin dated August 21, 1984, at paragraph 9, *with* two page letter to Katharine B. Alphin from Michael Eric Ross dated August 24, 1984)

4. Orkin is stated to be the world's largest termite and pest control company. (CX 142C; Rollins Dep. p. 202) Even though Orkin is the largest termite and pest control company, it apparently has a small market share. (Rollins Dep. p. 203; Geiger Dep. p. 16)

5. To be a provider of termite control services on a small scale requires little capital. (Rollins Dep. pp. 204-205) Chemicals used in termite control are commonly available. (Rollins Dep. p. 205) The techniques used in termite control services are widely known within the industry and can be learned without difficulty. (Rollins Dep. pp. 206-207)

6. Orkin has used a July 1 - June 30 fiscal year for each of the years 1978 through 1984. (RIR 57) Orkin

had total net revenues in the amounts indicated in the following fiscal years:

Fiscal Year Ending	Total Net Revenue
June, 1977	$138,613,108
June, 1978	148,362,959
June, 1979	164,826,769
June, 1980	181,582,829
June, 1981	193,568,292
June, 1983	212,333,107
June, 1984	228,898,037

(RA 4-10)

Orkin had the net profits indicated in the following fiscal years: [8]

Fiscal Year Ending	Net Profit
June, 1977	$22,428,534
June, 1978	19,258,821
June, 1979	17,140,842
June, 1980	23,744,000*
June, 1981	27,142,000*
June, 1983	30,127,691
June, 1984	31,548,071

(RA 11-17 [*Rounded to the nearest thousand])

Orkin had a net worth of $65,949,714.89 on June 30, 1980 and a net worth of $68,659,753 on June 30, 1984. (RA 18, 19; Respondent's Corrected Answer To Request No. 18 Of First Request For Admissions)

7. Among other services, Orkin provides to individuals and businesses services to treat houses, buildings, and other structures in order to destroy or protect against

termites, other wood-infesting organisms, moisture and wood decay. (Complaint, ¶ 3; Answer, Twelfth Defense, Paragraph 3; RA 1; Raymond Dep. pp. 22-23; Rollins Dep. pp. 15-16; Kimbell Dep. pp. 4, 6-7; Russell Dep. p. 13)

8. Orkin has entered into written agreements with its customers concerning the rendering of services to destroy or protect against termites, other wood-infesting organisms, moisture and wood decay. These agreements are hereinafter referred to as "termite contracts." (Geiger Dep. p. 11; CX 1-7, 9-14, 16, 27, 400, 414, 449, 473, 485; RA 2; RIR 59-60) The termite contracts charged a specified sum for the initial treatment provided by Orkin. (CX 1-7, 9-14, 16, 27, 400, 414, 449, 473, 485)

9. Under certain conditions Orkin issued guarantees of its services to destroy or protect against termites, other wood-infesting organisms, moisture and wood decay. These guarantees are hereinafter referred to as "termite guarantees." (Raymond Dep. pp. 18-23; Rollins Dep. pp. 18-19; Russell Dep. p. 13; CX 17-26; RA 3; RIR 61-62)

10. Since prior to 1956, Orkin has used preprinted form contracts and guarantees prepared by Orkin. (Geiger Dep. pp. 11, 21-22, 24-25; CX 1-14, 16, 27, 400, 414, 449, 473, 485; RX 129A-Z46, 685A-B) Orkin salesmen did not have the authority to vary the terms of the preprinted form contracts and guarantees. (Geiger Dep. p. 11)

11. In general, prior to 1966, Orkin offered termite guarantees for continued protection to the treated property for a specified price which lasted for a term of from five to fifteen years. (RIR 4; RX 129A-Z46; Geiger Aff. ¶ 4) On or about January 1, 1966, Orkin began using the term "lifetime" in its [9] termite contracts and/or termite guarantees. (RIR 1) Earl F. Geiger, Vice Chairman of the

Board of Rollins, Inc., who was Executive Vice-President of Orkin from 1964 to 1976, originated the "lifetime" guarantee concept for Orkin and proposed its adoption by Orkin. (RIR 2; Geiger Dep. pp. 4-5, 15) Mr. Truly D. Nolen, founder, owner, and President of Truly Nolen of America, Inc., claims to have originated the idea of the lifetime guarantee on termite control services contracts in 1955. (Nolen Aff. ¶ 6) Other Orkin competitors use the lifetime concept. (Hromada Aff. ¶ 5)

12. Concerning the purpose of the lifetime guarantees, Mr. Geiger has given the following testimony:

> Q. What was the purpose of these new lifetime guarantees?
>
> A. Well, Orkin at that time was the largest pest control company in the country. We did 80% of the advertising for the pest control industry, or roughly that. We claimed just about 13% of the business. The obvious strategy was to try to offer a distinctly better service to the public than our smaller competitors could offer. So any time you could enhance your package, your marketing package, you did so.
>
> Q. And that was the reason for the lifetime?
>
> A. Yes. We were able to do it because the primary termiticide at that time was proving to be more successful and more effective than we ever thought it would be.

(Geiger Dep. pp. 16-17)

13. Termite guarantees issued by Orkin include a lifetime retreatment guarantee, a lifetime retreatment and repair guarantee, and a lifetime guarantee on pretreatment work on new construction. (Raymond Dep. p. 19-20)

14. The lifetime retreatment guarantee provides in part that at no extra cost to the customer Orkin will apply any necessary treatment to the premises if infestation occurs during the duration of the guarantee. (Rollins Dep. p. 18; CX 17-22; RIR 61) This type of guarantee is sometimes referred to as a "LC guarantee." (Rollins Dep. p. 18; Raymond Dep. p. 20)

15. The lifetime retreatment and repair guarantee provides in part that at no extra cost to the customer, Orkin will make repairs (up to a stated dollar maximum) to the structure and its contents in order to remedy any new damage caused by subterranean termites, provided that it is established that the new damage occurred after the initial treatment, and that at the time of [10] discovery of the new damage, the damaged areas are infested with live subterranean termites. (Rollins Dep. p. 18; CX 23-26; RIR 61) This type of guarantee is sometimes referred to as a "LR guarantee." (Rollins Dep. p. 19; Raymond Dep. p. 19)

16. Prior to 1969, Orkin's LR guarantees had a liability limitation of $25,000. In 1969, Orkin adopted a policy of issuing LR guarantees with a liability limitation of $100,000. (RIR 63)

17. The lifetime guarantee on pretreatment work is the same guarantee as the LR guarantee, except that Orkin's pretreatment guarantee is for new construction and its LR guarantee covers existing structures. (RA 21; CX 150A-B) The lifetime pretreatment guarantee is sometimes referred to as a "PR guarantee." (Raymond Dep. pp. 19-20)

18. Orkin's termite contracts and termite guarantees provide for annual fees to be paid in order to continue the protection that is guaranteed. If the customer abides by

the contract, and pays Orkin the specified annual renewal fee, the guarantee is to remain in effect. (CX 1A, 2A, 3, 4A, 5A, 6A, 7A, 9A, 10A, 11A, 12A, 13A, 14A, 16A, 27A, 400A, 414A, 449A, 473A, 485A; Respondent's Motion for Access, pp. 2-3)

19. Orkin's termite contracts and termite guarantees, including those entered into prior to February 1, 1975, that used the term "lifetime," had a "structural modification" clause providing that in the event the premises were structurally modified, altered or otherwise changed after the date of initial treatment, the agreement would terminate, unless a prior written agreement was entered into by the purchaser for Orkin to reinspect the premises, provide additional treatment, and/or adjust the annual renewal fee. (CX 1B, 2B, 4B, 5B, 6B, 7C, 9B, 10B, 11B, 12B, 13B, 14B, 16B, 17A, 18A, 19A-B, 20A-B, 21A-B, 22, 24A-B, 25A-B, 26A-B, 27B, 400B, 414B, 449B, 473B, 485B; RIR 20, 59-62)

20. Before February 1, 1975, Orkin's termite contracts and termite guarantees that included the term "lifetime" did not mention adjustments or increases of the specified annual renewal fee necessary to continue the lifetime guarantees issued with respect to those contracts, absent the treated premises being structurally modified, altered, or otherwise changed after the date of initial treatment. (CX 1A-B, 2A-B, 3, 4A-B, 5A-B, 6A-B, 7A-C, 9A-B, 10A-B, 11A-B, 12A-B, 13A-B, 14A-B, 16A-B, 17A-B, 18A-B, 19A-B, 20A-B, 21A-B, 22, 24A-B, 25A-B, 26A-B, 27A-B, 400A-B, 414A-B, 449A-B, 473A-B, 485A-B; RIR 20, 59-62; Respondent's Motion for Access, p. 3) These termite contracts are hereinafter referred to as "pre-1975 contracts." Likewise, guarantees extended by Orkin to

a customer in connection with the execution of a pre-1975 contract are referred to as "pre-1975 guarantees," and customers holding these contracts or guarantees are often referred to as "pre-1975 customers." [11]

21. Numerous pre-1975 contract forms contained a clause stating that the contract, graph and specification sheets, and upon issuance, the guarantee, constituted the complete agreement between the parties, and that the agreement could not be changed or altered in any manner, oral or otherwise, by any representatives of Orkin, unless alterations or changes were in writing and executed by a corporate officer of Orkin under the corporate seal. (CX 400A-B [Form 225 Rev. 1-69]; CX 9A-B; CX 473A-B; CX 10A-B [Form F-19-135 Rev. 11/70]; CX 414A-B; CX 485A-B [Form 225 Rev. 11/70]; CX 11A-B [Form F-19-135 Rev. 9/72]; *compare* CX 449A-B [Form F-19-135 Rev. 2/73], *with* CX 13A-B [Form F-19-135 Rev. 11/73]; CX 12A-B [Form F-21-316]; CX 14A-B [Form F-21-316]; CX 16A-B [Form F-21-317]; RIR 59-60)

22. CX 1A is a contract (termed Service Order) dated November 20, 1965, with a customer located in Louisville, Kentucky. The contract provides for a Control and Repair guarantee to be issued. The Annual Renewal Premium is specified as $17.00. This contract has the following provision:

> In addition to the initial term specified in Paragraph 1 above, the Guaranty may, at the sole option of the undersigned, be renewed annually for *Lifetime* additional years by making payment of the Annual Renewal Premium on or before the renewal date of each subsequent year and Orkin agrees to reinspect the premises upon receipt of each Annual Renewal Premium Payment.

(The word Lifetime, above, was handwritten in a blank space provided in the contract.)

CX 2A is a contract (Service Order) dated November 30, 1966, with a customer located in Louisville, Kentucky. The contract provides for a Lifetime Control and Repair guarantee. The Annual Renewal Fee is specified as $18.00. The contract has the following provision:

> The Guaranty checked above will be issued and delivered to the Purchaser upon completion of initial treatment. Guaranty will be effective as long as payment is made in accordance with the Terms and Conditions of this Service Order.
>
> It is further agreed that Guaranty will provide for an initial term of:
>
> 12 months. ORKIN will reinspect the premises upon expiration of the initial term and upon receipt of the Annual Renewal Fee.
>
> Guaranty at the sole option of the Purchaser may be renewed annually by making payment of the Annual [12] Renewal Fee on or before the renewal date of each subsequent year.

CX 3 is a contract (Service Order) dated March 23, 1968 with a customer located in Norfolk, Virginia. This contract provides for a Lifetime Control and Repair guarantee to be issued. The contract provides as follows:

> ORKIN CONTINUOUS PROTECTION GUARANTY Under Orkin's Continuous Protection Plan, the above named property will be reinspected in *November 1968* upon prompt payment of *$18.00* (plus tax where applicable), and annually thereafter in *November*

upon payment of *$18.00* (plus tax where applicable .....), beginning in *1969*.

(The italicized portions above were handwritten.)

The contract also provided:

Guaranty will be effective so long as payment is made in accordance with the Terms and Conditions of this Service Order.

CX 400A is a contract with a Bethesda, Maryland, customer dated April, 1969, having basic terms identical to CX 3, above.

CX 414A is a contract dated February 5, 1972, with a customer located in Chesterfield, Missouri. This contract provides for a Lifetime Control and Repair guarantee and states as follows:

ORKIN CONTINUOUS PROTECTION GUARANTY

Orkin's Continuous Protection Guaranty will provide protection for the above named property including Annual Reinspections upon payment of the initial charges and an Annual Renewal Payment of *$37.00* starting *February 1973* and each *February* thereafter.

See also CX 421A, an October, 1972, contract with provisions similar to CX 414A, as does CX 439A, a May, 1972, contract with a customer located in Surfside, South Carolina.

CX 4A, a contract (Service Order) dated March 1969, with a customer located in Petersburg, Virginia, provides for a Lifetime Control and Repair guarantee. The Annual Renewal Fee is specified as $18.00 . The contract further provides that:

> ORKIN will, AT NO EXTRA COST, reinspect the premises annually during said initial term and upon receipt of the Renewal Fee thereafter. [13]

CX 6A, a contract (Service Order) dated September 25, 1968, with a Brownsville, Texas customer, provides for a Lifetime Control guarantee, and for an Orkin Continuous Protection Guarantee upon the payment of an annual fee of $20.00.

CX 7A, a contract (Service Order) dated March, 1968, with a W. Columbia, South Carolina customer, provides for a Lifetime Control and Repair guarantee upon payment of an annual renewal fee of $15.00.

CX 9A, a contract dated December 17, 1969, with a Tulsa, Oklahoma customer, provides for a Lifetime Control and Repair guarantee and an Orkin Continuous Protection Guarantee upon payment of an annual renewal fee of $30.00.

CX 10A, a blank contract bearing form number F-19-135 REV. 11/70 has provisions for Lifetime Control and for an ORKIN CONTINUOUS PROTECTION GUARANTEE "so long as payments are made in accordance with the Terms and Conditions of this Contract." CX 11, a blank contract bearing form number F-19-135 REV. 9/72 has provisions similar to the provisions of CX 10A.

CX 13 is a blank contract with a form revision date of 11/73, which provides for a Lifetime Control guarantee. The Orkin Continuous Protection Guarantee states that:

> Its coverage, including annual reinspection, will be effective for a period of ..... years upon payment of the initial charges and thereafter for a period of ..... years, so long as renewal payments of ..... are made annually.

CX 205G is a contract (Service Order) dated March 10, 1969, with a customer located in St. Francisville, Louisiana, which provides for a Lifetime Control guarantee and for an Orkin Continuous Protection Guarantee upon payment of $75.00 annually, to continue "so long as payments are made in accordance with the Terms and Conditions of this Service Order." CX 205R is a 1969 contract with a New Orleans, Louisiana, customer which is similar to CX 205G, with a renewal fee of $30 annually.

CX 205W is a contract dated July 3, 1974 with a customer named Percy Bullock located in St. Amant, Louisiana. It has the following provision:

> ORKIN CONTINUOUS PROTECTION GUARANTEE
>
> The guarantee checked above will be issued to the buyer upon competion of initial treatment. The Guarantee will cover the above named premises and will be subject to the General Terms and Conditions on the reverse side hereof. Its coverage, including annual reinspection, will be effective for a period of *2 years* upon payment of the initial charges and thereafter for a period of [14] *LIFE* years, so long as renewal payments of *$20* are made annually.
>
> (The italicized words were handwritten.)

CX 205Z3 is a contract with the same customer as above, Percy Bullock, dated February 3, 1975. This contract, entered into *after* Orkin changed its guarantee provisions, has the following provision:

> ORKIN CONTINUOUS PROTECTION GUARANTEE
>
> The type Guarantee checked above will be issued to the Buyer upon completion of initial treatment.

The Guarantee will cover the treated premises and will be subject to the General Terms and Conditions on the reverse side hereof. The Guarantee will be effective for a period of *2 years* upon payment of the initial charges and thereafter for a period of * * * *Life years*, so long as renewal payments are made annually. ORKIN guarantees that the first four renewal payments wil be *$35.00*. Thereafter, ORKIN reserves the right to increase renewal payments by giving written notice to the Buyer in advance of the renewal date. During the effective period of the Guarantee, ORKIN will reinspect the premises at such time as ORKIN may deem necessary, or annually upon the Buyer's request. No failure on the part of the Buyer to request reinspection shall, in any way, affect the Buyer's rights under this contract. The Buyer agrees to make the premises available for reinspection.

(The italicized words were handwritten.)

23. CX 205U is a form letter which Orkin issued to a customer in New Orleans, Louisiana. The complete letter reads as follows:

TREATMENT AND CORRECTIVE MEASURES

Date: April 23, 1967 Re: Property Located at:
785 Brehm Pl.
New Orleans, La. 70121

The treatment and corrective measures necessary to assure you complete protection are described in the detailed specifications which are keyed to the scale drawing on the following pages.

> Upon completion of the work, and payment for our services in the amount of *$163.00,* you will receive ORKIN'S written *$25,000.00 Lifetime Termite* [15] *Damage Guarantee.* This guarantee is backed by our corporate assets of more than $50,000,000.00.
>
> This sensational Guarantee provides for an annual reinspection to assure that termites do not return. As the owner of an Orkin-treated building, you may continue protection from year to year thus assuring virtually lifetime protection against reinfestation. In addition, your property is protected up to $25,000.00 against repairs required as a result of subsequent termite infestation in the treated areas.
>
> The cost of Orkin's Lifetime Guarantee is modest - a nominal annual inspection renewal fee of only *$22.00* relieves you of all further termite worries.

Similar letters are in the record. RX 31 is a letter dated September 26, 1968, concerning property located in Cayce, South Carolina; RX 30 is a letter dated January 3, 1970 concerning property located in Tucson, Arizona; RX 581F is a letter dated March 1, 1971 concerning property located in Bethesda, Maryland; and RX 561F is a letter dated October 27, 1971 concerning property located in Summerville, South Carolina.

24. In approximately May of 1974, Orkin began revising its termite contract form(s) by adding a term or provision that provided for an increase of annual fees that did not depend on whether the treated premises were structurally modified, altered or otherwise changed after the date of the initial treatment. (*See* CX 205Z3 quoted above.) The revised termite contract forms containing such a provision were first used in each of Orkin's

sales districts on or about February 1, 1975. (RIR 20; Raymond Dep. pp. 54-57, 81 and Dep. Ex. 8; Rollins Dep. p. 51; RX 131A-B)

25. Prior to entering into pre-1975 contracts with customers, in all states in which Orkin operated its termite control services business, Orkin had entered into termite contracts that specifically provided for increases in annual renewal fees, which increases did not depend on whether the treated premises were structurally modified, altered, or otherwise changed after the date of initial treatment. (RIR 22; Russell Dep. pp. 35-38 and Dep. Ex. 8; F. 11)

26. The term "lifetime" in Orkin's pre-1975 contracts refers to the duration of the guarantee(s) given by Orkin in the particular contract involved, subject to and as limited by the terms and conditions thereof, including without limitation the obligation of the buyer to pay an annual renewal fee. Within this context, the term "lifetime" in the contracts refers to the lifetime of the premises initially treated under the contract involved as they structurally existed on the date of such initial treatment. (RIR 5; Geiger Dep. pp. 15-17; Kimbell Dep. p. 130; [16] *see also* Nolen Aff. ¶ 5; Hromada Aff. ¶ 5) The guarantee was transferable to the new owner of the treated premises in the event the treated premises were sold. (Raymond Dep. Exs. 5, 6) Contrary to Orkin's interpretation that the "lifetime" guarantee referred to the lifetime of the treated premises, some state officials interpreted the term "lifetime" to refer to the lifetime of the homeowner who entered into the contract, or to the period the original homeowner held title to the original treated premises. (RX 201A, 208B, 211A)

27. During 1968, Orkin promoted its services for protection against termites in a promotion called "Orkin 12," developed by an outside advertising agency, Bearden & Associates. (Raymond Dep. pp. 44-47 and Dep. Ex. 6; Geiger Dep. pp. 28-29; RIR 49; RA 22) The Orkin 12 promotion was advertised in a pamphlet, on billboards, in magazines, and on radio and television. (RIR 51) Orkin spent approximately $1,157,000 advertising Orkin 12. (RIR 50) The advertising program was discontinued before its slated expiration date because it failed to produce the hoped-for results. (Geiger Dep. pp. 29-30, 34-35)

28. The pamphlet concerning Orkin 12 was issued as point-of-sale material in presenting Orkin's services to its customers. (Raymond Dep. p. 46 and Dep. Ex. 6; Kimbell Dep. pp. 39-41 and Dep. Ex. 9) The pamphlet contained the following language as point 6 (hereinafter "point 6");

> LIFETIME GUARANTEE. Orkin's lifetime termite protection plan includes annual reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection *is very modest and never increases.* In case of a sale, the guarantee is transferable.

(Kimbell Dep. Ex. 9; Raymond Dep. Ex. 6) (emphasis in original)

29. The Orkin 12 promotion was used and advertised in each of the following states plus the District of Columbia during 1968: Alabama, Arkansas, Arizona, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland,

Michigan, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. (RA 23; CX 650K-L) The Orkin 12 program was utilized in varying degrees by Orkin's branch offices and sales personnel. (Goodman Aff. ¶¶ 4, 5; Bourgeois Dep. p. 8; Edwards Dep. pp. 12, 13; Jones Aff. ¶ 4)

30. Orkin promotional literature entitled *Facts You Should Know About Termites,* with a revision date of September, 1970, stated: [17]

> Orkin Provides a
> $100,000.00 Lifetime
> Termite Repair
> Guarantee
>
> This guarantee provides for an annual reinspection to guard against new termite attack. As the owner of an Orkin-treated home, you may continue protection from year to year to assure virtual lifetime protection against reinfestation. Orkin's guarantee covers your home for $100,000.00 against repairs as a result of subsequent termite infestations. The cost of Orkin's "Lifetime Guarantee" is modest. Only a nominal annual fee relieves you of all future termite worries.

(CX 645A, Rev. 9/70)

31. Orkin's promotional literature with a revision date of November, 1970, stated:

> Orkin guarantees effective pest control. Termite control services are backed by a special $100,000 guarantee.*

The phrase noted by the asterisk was:

> Remains in effect for the lifetime of the property by payment of a low annual renewal fee.

(CX 648B, D)

32. In promotional literature with a revision date of March, 1971, Orkin represented that its $100,000.00 Lifetime Termite Repair Guarantee was "Another Orkin First." It stated:

> Only Orkin, the world's largest in termite control, could make such a sensational termite Guarantee available to America's property owners.
>
> This guarantee protects your property up to $100,-000.00 against repairs which might be required as a result of subsequent termite infestations in the treated areas.

(CX 646F, G, Rev. 3/71)

Orkin's promotional literature with a revision date of February, 1973, stated:

> Orkin offers much more for your investment and unmatched protection for your home. Our *guarantee* plan means *yearly checkups* by trained re- [18] inspectors. For pennies a day, it can be *renewed,* at your option, for the *lifetime* of your home and *retained* by the new owners if you move.

(CX 39R, T) (emphasis in original)

34. In a form letter with a revision date of September, 1973, Orkin stated:

> We are pleased to render the following quotation to cover termite control (chemical soil treatment) for the above noted new construction:
>
> * * *
>
> Upon completion of the work as required Orkin Exterminating Company shall furnish the owners with a $100,000 termite damage guarantee, renewable annually for the life of the building.

(CX 35)

35. Orkin attempted to implement uniform sales techniques for its sales people. (Raymond Dep. pp. 26-41 and Dep. Ex. 1-5) It was Orkin's company policy that new salesmen should be given "Termite Sales Training Lessons 1-6." (Raymond Dep. p. 38 and Dep. Ex. 4) Complaint counsel contend Lesson #4 was dated 1972. (*See* Complaint Counsel's Answer and Reply Brief, p. 14 n. 8.) Lesson #5 has a copyright date 1973. (RX 677Z87) Termite Sales Training Lesson #4 contained the following:

> HOW DOES THE CUSTOMER BENEFIT FROM ORKIN'S SUBTERRANEAN TERMITE TREATMENT?
>
> A. They receive a lifetime guarantee protection which is non-cancellable by Orkin and renewable by customer's option.
>
> B. Their cost of the renewal remains the same so long as renewal payments are made annually.
>
> * * *
>
> E. The guarantee is transferable if they sell their home.

(Raymond Dep. pp. 39-40 and Dep. Ex. 5) Termite Sales Training Lesson #4 also instructed branch salesmen that "(y)ou should always figure the price for Orkin Service by the Termite Pricing Schedule." (Raymond Dep. Ex. 5) The Orkin training programs apparently were not uniformly utilized throughout the company. (Jones Aff. ¶¶ 6, 7; Goodman Aff. ¶¶ 7, 8; Rollins Dep. pp. 10, 11, 20, 21) Some sales representatives were instructed to inform [19] prospective customers that the lifetime guarantee annual renewal fee was fixed and did so; others never received such instructions and did not so inform customers. (Goodman Aff. ¶ 9; Jones Aff. ¶ 8; Landry Dep. p. 63; Bourgeois Dep. p. 23; Edwards Dep. p. 30; Hoffman Dep. p. 29; Thompson Dep. pp. 20-21; Terrebonne Dep. pp. 20-21)

36. A pricing schedule with a revision date of October, 1971, for structures of conventional or slab construction, specified the following annual fees for new contracts depending on the price of the original job and the type of lifetime guarantee to be issued:

Original Job Price	Annual Fee For LR Guarantee	Annual Fee For LC Guarantee
$130	25.00	23.00
140	26.00	24.00
150	27.00	25.00
160	28.00	26.00
170	29.00	27.00
180	30.00	28.00
190	31.00	29.00
200	32.00	30.00
210	32.00	30.00
220	33.00	31.00
230	34.00	32.00

Original Job Price	Annual Fee For LR Guarantee	Annual Fee For LC Guarantee
240	34.00	32.00
250	35.00	33.00
260	35.00	33.00
270	35.00	33.00
280	36.00	34.00
290	36.00	34.00
300	37.00	35.00
400	41.00	39.00 [20]
500	44.00	42.00

(CX 385C)

The pricing schedule states: "*Important* - You are selling a *non-cancelable,* lifetime guarantee." (CX 385C) (emphasis in original)

37. A pricing schedule with a revision date of May, 1973, for structures of conventional or slab construction, specified the following annual fees for new contracts depending on the price of the original job and the type of lifetime guarantee to be issued:

Original Job Price	Annual Fee For LR Guarantee	Annual Fee For LC Guarantee
$130	25.00	25.00
140	26.00	25.00
150	27.00	25.00
160	28.00	26.00
170	29.00	27.00
180	30.00	28.00
190	31.00	29.00
200	32.00	30.00
210	32.00	30.00

Original Job Price	Annual Fee For LR Guarantee	Annual Fee For LC Guarantee
220	33.00	31.00
230	34.00	32.00
240	34.00	32.00
250	35.00	33.00
260	35.00	33.00
270	35.00	33.00
280	36.00	34.00
290	36.00	34.00
300	37.00	35.00
400	41.00	39.00 [21]
500	44.00	42.00

(CX 384A-B)

This pricing schedule also states: *"Important* - You are selling a *non-cancelable,* lifetime guarantee." (CX 384B) (emphasis in original)

38. In 1980, Gary W. Rollins, then President of Orkin, decided to increase the annual renewal fees of customers holding pre-1975 contracts and pre-1975 guarantees above the amount stated in the contracts and guarantees of those customers. (Rollins Dep. pp. 6, 12, 55-56, 73) Gary W. Rollins is currently President of Rollins, Inc. (Rollins Dep. p. 5)

39. Prior to increasing the annual renewal fees on pre-1975 contracts, Orkin requested that Arnall, Golden & Gregory, an Atlanta law firm, provide Orkin with a written legal opinion. The law firm prepared a legal opinion dated December 6, 1978. The opinion concluded that Orkin's pre-1975 contracts appear to be of an indefinite duration and, as such, are terminable after a rea-

sonable period of time. (Rollins Dep. pp. 60-62; Schneider Dep. p. 64; RX 44A-F) James M. Schneider, General Counsel of Rollins, Inc., reviewed the opinion given by Arnall, Golden & Gregory, and confirmed to management the conclusion reached in that opinion. (Schneider Dep. p. 67; RX 170A-B) Mr. Gary Rollins reviewed these legal opinions prior to making his decision to increase the annual renewal fees for pre-1975 contracts. (Rollins Dep. pp. 60-64, 73, 80-81; RX 43A-G; RX 170A-B)

40. The legal opinion rendered by Arnall, Golden & Gregory assumed as the issue to be considered: "Are there any grounds for the claim that a contract which may be renewed or extended from year to year, indefinitely, is unenforceable." The author of the opinion also stated: "I assume that the Orkin contract involves a right to *extend the term of the original contract* and here the issue would be two-fold: (1) possible failure as a perpetual contract and (2) possible failure for indefiniteness of terms." (RX 44A) (emphasis in original.)

41. At the time that James M. Schneider, General Counsel of Rollins, Inc., confirmed to management the conclusion reached by the law firm of Arnall, Golden & Gregory, Mr. Schneider was not aware of Orkin's sales literature statements; i.e., the Orkin 12 promotion. Mr. Schneider was the person at Rollins, Inc., who had contact with the law firm of Arnall, Golden & Gregory and requested the legal opinion from the firm (Schneider Dep. pp. 62-63; Schneider Dep. [dated February 8, 1985] pp. 12, 22).

42. Between 1978 and 1980, Orkin undertook an extensive expense reduction program before deciding, in February 1980, to increase the annual renewal fees on pre-

1975 contracts. Also, [22] during February 1980, Orkin increased by 40% the annual renewal fees on post-1975 customers whose contracts contained an express provision permitting such increases. (RX 46A-D; RX 42A-E)

43. Prior to making his decision to increase the annual renewal fees of customers holding pre-1975 contracts and pre-1975 guarantees, Gary Rollins presented a synopsis of issues (dated February 7, 1980) on the subject of the increase to R. Randall Rollins, who was then President of Rollins. (Rollins Dep. pp. 73-80, 85, 86 and Dep. Ex. 12) In part, the synopsis contained the following:

> Please find below and attached my analysis of the "pros and cons" regarding raising the renewal amount of our pre-1975 termite customers.
>
> PROS
>
> 1. Potential income increase of $2,286,614 (#232,-969 accounts valued at $6,017,406 × 40% increase less 5% cancellations)
>
> CONS
>
> 1. A few customers advised by salesmen and literature that renewal amount would be fixed.
>
> 2. State regulatory agencies (Pest Control, Consumer Protection, etc.) could interpret our contract in some cases to imply the renewal amount is fixed. Those who obtain old proposal Information will discover we put this in writing.
>
> 3. Our longer term employees might feel that we are going back on our word.
>
> 4. There could be customer lawsuits and complaints.

OPTIONS

1. Leave as is.

2. Write customers and put on voluntary basis.

3. Meet with individual state regulatory and consumer groups to obtain understanding and raise.

4. Raise and handle exceptions.

(Rollins Dep. Ex. 12) [23]

44. Gary Rollins' recommendation to R. Randall Rollins, with which R. Randall Rollins concurred, was option 4 above, to raise the annual renewal fees and handle the exceptions. (Rollins Dep. pp. 73, 78-79)

45. Gary Rollins was aware of the Orkin 12 promotion at the time he wrote his synopsis to R. Randall Rollins. Literature containing point 6 of the Orkin 12 promotion was an attachment to Gary Rollins' synopsis to R. Randall Rollins. (Rollins Dep. pp. 76-80 and Dep. Ex. 12)

46. In 1980, Orkin sent notices to approximately 207,000 customers holding pre-1975 contracts or pre-1975 guarantees, that Orkin was increasing the annual renewal fees over the amount specified in those customers' contracts or guarantees. (RIR 23; Raymond Dep. pp. 224, 239 and Dep. Ex. 46) All customers were notified of the increase well prior to their respective renewal dates. (Raymond Dep. Ex. 16 [Beginning in August - October renewals]; RIR 25)

47. The notice of the increase of annual fees stated:

Dear Customer:

Thank you for being an Orkin customer and allowing us to protect your home against wood infesting organisms. We're sure you agree this protection is as important as homeowner and fire insurance, but it is much less expensive.

Through the past few years we have improved productivity to absorb our increased costs of gasoline, petroleum products, labor and increased government regulations. However, these increased operating expenses can no longer be totally absorbed while maintaining the high quality of service you deserve. Therefore, to maintain this quality protection, we now find it necessary to increase your annual renewal fee to the amount indicated on the enclosed Termite Renewal Invoice. We hope you understand we would not increase your renewal fee unless it was absolutely necessary.

Again, thank you for your patronage and understanding. Should you have a question concerning this matter, please contact your local branch manager as he can best assist you.

Sincerely,

/s/ Ron Kimbell
Director of Customer Service [24]

(Raymond Dep. pp. 89, 94 and Dep. Ex. 16 [at A00974])

Ron Kimbell was never an officer of Orkin. (Kimbell Dep. p. 53)

48. Notices reflecting increased annual renewal fees were sent to customers holding pre-1975 contracts from

Orkin's Home Office located at 2170 Piedmont Road, N.E., Atlanta, Georgia, and were transmitted by regular mail, along with first renewal notices two months prior to the renewal date. (RIR 25) Orkin began sending the notices concerning the increase of annual fees in August, 1980, for customers whose renewal month was October, 1980. (Raymond Dep. pp. 89, 252-54 and Dep. Exs. 16, 49)

49. Customers holding pre-1975 contracts or pre-1975 guarantees to whom notices were sent were located in the following states:

Alaska	Mississippi
Alabama	Montana
Arkansas	Nebraska
Arizona	North Carolina
California	New Jersey
Colorado	New Mexico
Connecticut	New York
District of Columbia	Nevada
Delaware	Ohio
Florida	Oklahoma
Georgia	Pennsylvania
Iowa	Rhode Island
Illinois	South Carolina
Indiana	South Dakota
Kansas	Tennessee
Kentucky	Texas
Louisiana	Utah
Maryland	Virginia
Michigan	Wisconsin
Minnesota	West Virginia
Missouri	Wyoming

(RIR 26)

50. The annual fees for pre-1975 contracts were increased to a minimum of $25.00 or by 40%, whichever was greater. (Raymond Dep. pp. 89, 252-54 and Dep. Exs. 16, 49)

51. Orkin received communications from customers and customers' attorneys that expressed their belief that Orkin did not have the right to increase annual renewal fees for pre-1975 contracts. (Kimbell Dep. pp. 42-45 and Dep. Ex. 10; Raymond Dep. pp. 108-109; CX 291, 292A-B, 293, 294, 295A-B, 296A-B, 297-300, 302, 303A-C, 304-306, 307A-B, 308A-B, 309A-B) Orkin's records indicate that as of May, 1981, its Customer Service department had received complaints about the increase in the annual renewal [25] fees on its pre-1975 contracts from less than 2% of its affected customers. This may not be a complete total of complaints received by Orkin since those complaints received by the branch offices may not be included in this total. Additionally the total of 5700 customers who had their increased annual renewal fees rolled back had to complain to receive any action. (F. 67, 58-60; RX 73; Rollins Dep. p. 119) Orkin has taken the position when customers have complained to it concerning the increase of annual fees for pre-1975 contracts that Orkin had a right to increase the annual renewal fee. (Rollins Dep. p. 148 and Dep. Ex. 31; F. 51-53; Raymond Dep. pp. 264-267 and Dep. Ex. 56)

52. Orkin had a policy of returning payments of customers who paid the amount specified in their contracts rather than the increased amount. (Kimbell Dep. pp. 68-69 and Dep. Ex. 14; Raymond Dep. p. 210; EX 288, 289B, 292A, 308A, 309B)

53. Concerning the increase of annual renewal fees for pre-1975 contracts, Ron Kimbell, Director of Rollins

Customer Service, in a letter dated August 11, 1980, wrote to Gary Rollins that:

> Several of the customers' phone calls and letters implied some things that caused me to review the contracts used from 1968 to present. Some of the contracts said:
>
> . . . . including Annual Reinspections upon payment of the initial charges and Annual Renewal payment of $..... starting ..... and each ..... thereafter.
>
> form 225 Rev. 11/70
> form F-19 135 Rev. 11/
>
> . . . . Its coverage, including annual reinspections will be effective for a period of ..... years upon payment of the initial charges and thereafter so long as renewal payments of $..... are made annually. No form #, approximately 1974.
>
> . . . . will be reinspected in ..... upon payment of $..... and annually thereafter in ..... upon payment of $..... beginning in ..... Rev 3/68
>
> After reviewing these contracts (not the guarantees) I have concluded that the pre-1975 increase is more questionable than ever. Several of the statements are leaning more towards the implication of no increase ever, than a possible increase at a later date. Based upon my experience I would say the decision to increase these accounts (even though we [26] need the revenue) will lead us down a path quite unpopular with our customers, the media, and the consumer groups. Angry comments from several customers,

one of which was an attorney leads me to conclude we could end up in court on this. One possibility this could lead to would be one "pioneer" taking us to court for all consumers that have been "damaged" by this action. I fully understand the reason and need for this increase, yet I request that this program be suspended immediately until such time as all parties involved (Legal, Public Relations, Customer Service, Orkin, Finance, etc.) can meet and discuss the repercussions of this program. I can support any program Orkin decides on, yet I feel we should all have a unified approach and understanding of this most delicate matter. May I hear from you?

(Kimbell, Dep. pp. 17, 42-46 and Dep. Ex. 10; Raymond Dep. p. 103 and Dep. Ex. 18) This letter was written at the time the increase in annual renewal fees on pre-1975 contracts was being implemented. (F. 46, 47, *supra.*)

54. John Raymond, Orkin's Director of Administrative Operations, has testified that "Ron Kimbell's job was to be like an ombudsman for the customer. His job was to make us aware of what the customers were saying, how they felt about things. He did his job very well." (Raymond Dep. p. 103) Mr. Kimbell's request for a suspension of the increase of annual renewal fees for pre-1975 customers was not granted. (Raymond Dep. pp. 103-104)

55. James M. Schneider, Rollins General Counsel, testified on February 8, 1985, that during the fall of 1978 he was shown an Orkin contract and asked whether there was a basis for increasing the renewal price. His reaction was stated as follows:

Well, I looked at the contract, and I recall that my reaction was the reaction that—or my initial reaction

> was that of most people that reviewed the contract, I didn't see offhand a basis for increasing the prices. The provision concerning the renewal prices appeared to be of indefinite duration using words like "hereafter" or "thereafter," and my instant or immediate reaction was there simply was not a basis for increasing the prices.

(James M. Schneider Dep. p. 19)

56. Orkin used a form letter in responding to numerous customers who inquired about the increase of the annual renewal fee. The letter explained the rationale behind the increase. (Kimbell Dep. pp. 27-29, 65-72 and Dep. Exs. 6, 13-16; Rollins Dep. pp. 179-181 and Dep. Exs. 42-43; CX 264A-B, 266A-B, 267A-B, [27] 268A-B, 269A-B, 270A-B, 271A-B, 273A-B, 274A-B, 275A-B, 276A-B, 277A-B, 278A-B, 279A-B, 280A-B, 281A-B, 282A-B, 283A-B, 284A-B, 285A-B, 286A-B) In part, the form letter stated:

> While our contracts prior to 1975 did not specifically mention increases, we believe that following a reasonable term of absorbing losses due to the impact of inflation, this increase is both consistent with law and reasonable business standards.
>
> * * *
>
> we appreciate your concern and hope that you now understand our position and will submit your renewal payment to keep your coverage in force.

(Kimbell Dep. Ex. 6)

This form letter made no mention of exceptions being made to the increase of the annual renewal fees. (*Ibid.*)

57. John Raymond has been Orkin's Director of Administrative Operations since 1976. In that position he

has been responsible for the administrative procedures used by Orkin, and for supervision of several departments, including Orkin's Policy and Procedures Department. (Raymond Dep. pp. 4-6) In a memorandum dated August 13, 1980, John Raymond wrote to Orkin's branch managers concerning the increase of annual renewal fees for pre-1975 contracts and the one exception to the increase which customers could invoke. In part, he wrote:

> If a customer tells you that our pre-1975 contract does not allow for an increase, you should explain that prior to the inflation spiral, practically no one had this provision in the contracts. Recent legal rulings interpret this as meaning that the renewal fee shall remain unchanged for a *reasonable period* which we interpret to be no more than five years.
>
> * * *
>
> If the customer states they have sales literature that specifically states there will not be an increase in the renewal fee, you should ask them to read the statement to you Some customers sold between 1967 and 1968 were given a pamphlet that stated the renewal fee would never increase. This statement was in the "Orkin 12 Point Plan." The statement, point number 6 says:
>
> 6. *Lifetime Guarantee.* Orkin's lifetime termite protection plan includes annual [28] reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection is very modest and never increases. In case of a sale, the guarantee is transferable.

> If any of your customers tell you they have a pamphlet in their possession that prohibits an increase you should ask them to read to you the exact wording. If the wording is not verbatum [sic] as stated in "point 6" above they are, in fact, eligible for an increase. If their material does have this statement, and you confirm it, then tell the customer a computer mistake was made and a corrected bill will be sent. Ask them not to pay until a correct bill is received.

(Raymond Dep. pp. 4-5, 105-107 and Dep. Ex. 19) (emphasis in original)

58. In a memorandum dated December 11, 1980, John Raymond wrote to branch managers that Orkin was willing to make further exceptions to the increase of annual renewal fees for pre-1975 contracts. In part, he wrote:

> It is not our desire to stand in judgment of the motives and memories of our customers. While we believe most of our customers were little concerned with the modest price of the renewal at this earlier time, we are willing to maintain the old renewal price for customers who state that at the time of purchase they relied on either a sales presentation or they construed the specific wording of the contract to provide that the renewal price would not be increased. We believe we are going beyond the letter as well as the spirit of the law in this matter and are willing to make this commitment provided that this exception to the general price increase is not abused. . . .
>
> * * *

We are willing to make exceptions to give certain customers the benefit of the doubt. While we intend to be flexible in our evaluations, you should be alert to any abuses, particularly where complaints from customers exceed 1% of the affected customer base. You should be sensitive to potential abuses and discuss the matter with your District Manager. This exception program should be [29] administered fairly and consistently in the interest of all our customers as well as the company.

(Rollins Dep. pp. 125-28 and Dep. Ex. 23)

59. Attached to Mr. Raymond's memorandum of December 11, 1980, were procedures for granting this exception to the increase of annual renewal fees. These procedures contained the following:

PROCEDURES FOR HANDLING – RENEWAL PRICE INCREASE EXCEPTIONS

1. The company will continue to bill for the renewal increase.

2. In the event of any complaints, the Branch will attempt to explain and justify this increase to our customers.

3. However, if a customer will not accept the rationale for the increase, we will honor their position and hold the renewal at the original rate, *provided* the customer will represent *in writing* his understanding at the time his or her contract was made. This is an exception and should be granted to those customers who bought our termite contract with the understanding that the renewal fee was set and not subject to change.

4. In such cases, the Branch Manager will advise the customer that their case will be reviewed as an exception, and will be submitted to the District Manager for consideration. Whether the inquiry is by phone or by letter, the attached Letter #1 should be prepared by the Branch (each letter to be neatly typed on your Branch Letterhead and signed by the Branch Manager) and sent to the customer. Please note that this letter requires a response from the customer stating that as a condition of sale, he or she believed that the renewal fee was not subject to change. Include a return envelope with your letter for the customer's convenience.

5. The Branch should forward all written customer responses to the District Manager. The District Manager should evaluate the reasonableness of the customer's position. Assuming the District Manager determines that the customer's position is correct, he will notify the Branch that the renewal price will be returned to the old amount. The Branch [30] will so advise the customer of the decision to maintain the old renewal price with attached Letter #2. . . .

(Rollins Dep. Ex. 23 [at A00075, A00077]) (emphasis in original)

The letters #1 and #2 referred to in the foregoing were as follows:

Letter #1

Dear Customer:

Thank you for your recent inquiry regarding our termite renewal price increase. We understand your feelings in this matter and as indicated below, we are

willing to make exceptions for the benefit of our customers from the general price increase previously announced. Before we discuss such exceptions, please allow us the opportunity to further explain our position.

At Orkin, as everywhere else, inflation meets us at each turn. Over the years we have increased employee productivity and reduced expenses, yet the inflation rate has far overshadowed our own internal efforts in fighting inflation. In 1975, we clearly recognized the total effects inflation brings. Beginning in 1975 our service contracts clearly explained that the renewal fee could increase at some time in the future. Of course, this is directly related to the inflation spiral and no one knows when it will stop.

Prior to 1975, and even as early as the late 1960's, few people had any concern for inflation as we do now. In those times no one had automatic rate increase factored in their contracts. While our service contracts prior to 1975 did not specifically mention price increases, we believe that, following a reasonable term, this increase is a fair and reasonable business practice. We further had our legal staff review this point and they believe we are on sound legal ground in requesting a price increase.

Since the late 1960's we have maintained the price line. Now, and only as a last resort, we decided to increase these accounts. However, the increased renewal will still not bring us even with inflation and is well below our current renewal charge. We certainly want to keep your business, and believe this increase is reasonable in the light of today's economic condition. [31]

As indicated above, we are willing to make certain exceptions. If (1) at the time you entered into your contract with Orkin you were advised by our sales representative that your renewal price could not be increased at any time in the future or (2) at the time of purchase you reached the same conclusion based on your reading of the materials supplied to you, Orkin will maintain for you the fixed renewal price. We are willing to take our customers at their word and are relying on their honesty. Kindly write and advise us as to whether you relied on either a statement by our sales representative or the contractual materials supplied to the affect [sic] that your renewal price would not be increased as a condition of entering into the contract with Orkin. Please address your letter to me. Your letters will receive prompt review and decision. It is important that you notify us in writing so that a request for exception can be evaluated and processed.

As our customer, we want to keep you satisfied. Please let us hear from you in this matter.

Sincerely,

Branch Manager

(Rollins Dep. Ex. 23 [at A00079])

Letter #2

Dear Customer:

Your letter regarding your renewal price increase has been carefully considered.

As we mentioned earlier, we feel that our contract gives Orkin the right to increase your renewal amount;

however, we want to be fair. Because of the conditions in your case, we are willing to make an exception.

Your satisfaction as a customer is our most important concern, so we will maintain your renewal fee at the original rate. Enclosed is a corrected renewal statement for your payment. As soon as we receive your payment we will submit a change request to reduce your renewal fee to the original amount. In the meantime, if you receive a renewal statement at the higher amount, *please disregard.* [32]

We appreciate your business and we look forward to continuing to serve you.

Sincerely,

Branch Manager

(Rollins Dep. Ex. 23 [at A00080]) (emphasis in original)

60. In a memorandum dated April 28, 1981, Linda Morton, Orkin's Manager of Policy and Procedure, wrote Orkin's branch, district and regional offices and stated, in part:

The increase of termite renewals for our older customers sold from January 1940 through December 1974 will end with the billing of our September renewal customers in July 1981.

Until then we will still need to address the problem of decreasing those customers who have a legitimate argument for not wanting to accept a price increase. The procedure for decreasing termite renewals was sent out by John Raymond - Orkin Operations - December 11, 1980.

The following procedure is a revision of that memo so please read it carefully. It is intended to simplify the process.

A. Please be sure to follow the procedure carefully in order to be sure that the customer's account is handled properly.

NOTE: This does not apply to contracts sold in 1975 or later. Beginning in 1975 our contract gave us the right to increase after five years. Those renewals are not to be decreased.

1. When the customer calls, determine the year of completion. If it is before 1975, attempt to explain and justify the increase to the customer.

2. If the customer strongly objects to the increase on the grounds that they were told at the time of sale that the renewal fee would never increase, explain that you will need to send them a letter from your Branch Manager and that you can decrease the renewal fee upon receipt of a written request from them.

(Raymond Dep. pp. 170-172 and Dep. Ex. 27; RIR 54, pp. 32-33) [33]

The letter from the branch manager referred to in point 2 above was identical to letter #1 (Rollins Dep. Ex. 23 at A00079) set forth in F. 59, *supra*. (*Compare* Raymond Dep. Ex. 27, letter #1 [at A05280], *with* letter #1, Rollins Dep. Ex. 23 [at A00079], as set forth in F. 59)

61. In a memorandum dated March 2, 1981, R. M. Russell, Vice-President of Government Relations for Orkin, suggested to Gary Rollins that customers whose contracts

were entered into in 1968 should no longer be sent notices for increased annual renewal fees. In part, he wrote:

> As we are now primarily through our renewal increase program, I think it might be to our advantage to consider dropping 1968 contracts towards renewal increase for the remainder of the program. This would give us some base to show our good intent in any future litigation regarding this program. Even if we do stop now, all months will have received two or more notices. In my opinion, the possible reduction in renewal collections would be worthwhile towards our future negotiations and possible litigation.

(Russell Dep. pp. 3-4, 75-78 and Dep. Ex. 17; *see also* Russell Dep. pp. 71-75 and Dep. Ex. 16)

62. From August 1981 through July 1982, Orkin rolled back the increase of annual renewal fees of customers who had entered into their pre-1975 contracts in 1968. (Raymond Dep. pp. 180-184 and Dep. Ex. 32) Customers were notified of the rollback by an insert included in the renewal notice that was sent two months prior to the anniversary month of their contracts. Customers who had previously paid an increased rate were given credit for the amount of the increase. (Raymond Dep. Ex. 32) In part, the insert stated:

> Your annual renewal fee was increased last year for the first time since you contracted for Orkin's services in 1968. The justification for the increase was provided at that time.
>
> We have subsequently learned that a marketing program may have been used in your locality in

> 1968 which could have led you to believe that the amount of your termite renewal premium would never increase. We do not know whether you were aware of this program at the time you contracted for Orkin's services. However, we at Orkin believe that the simplest and fairest course is to maintain your renewal premium at the amount initially described in your contract. You are receiving with the current invoice, a credit equal to the increase [34] that was posted last year. Your next year's renewal will be at the original rate.

(*Ibid.*) The "marketing program" referred to in the insert discussed above was the "Orkin 12" promotion (Raymond Dep. p. 181), which was known to Orkin management at the time the decision to increase the annual renewal fees was made. (F. 45)

63. Approximately 15,832 customers had their annual renewal fees returned to the level specified in their contracts because of the Orkin 12 promotion. (RIR 29b)

64. By May 25, 1981, Orkin had received payments of annual renewal fees of $1,257,629 in excess of the sum of the amounts specified in pre-1975 contracts of customers who paid their increased annual renewal fees. (Raymond Dep. pp. 216-224, 232-236 and Dep. Exs. 43, 44, 41 [at A00889] ["3. $ INCREASE PAID THROUGH 5/25/81 UPDATE $1,257,629])

65. By May 25, 1981, Orkin had received payments of annual renewal fees of $113,615 in excess of the sum of the amounts specified in pre-1975 contracts of customers who entered into their contracts in 1968 and who paid their annual renewal fee. (Raymond Dep. Ex.

44 [at A00175]) As of November, 1981, approximately 170,000 customers, or 82.1%, of pre-1975 customers had paid the increased price or the frozen price. Other statistics indicate that as high as 87% of such customers had paid. (Rollins Dep. Ex. 46) During its fiscal year ending on June 30, 1983, by June 20, 1983, Orkin had received payments of annual renewal fees of $959,158 in excess of the sum of the amounts specified in pre-1975 contracts of customers who paid their annual renewal fees. (CX 138P) Orkin has estimated its increased renewal revenue through 1984 from its pre-1975 customers to be $7,515,764. (CX 195B)

66. By August 1, 1984, Orkin had approximately 164,402 customers with pre-1975 contracts or pre-1975 guarantees. (RA 20) Approximately 142,902 customers were paying increased fees as of this date (164,402 less 21,500). Orkin's cancellation rate on its termite contracts is normally 5.8% overall and 5.2% on contracts that have been in force over five years. (RX 40A) Orkin contends that its cancellation rate on its pre-1975 contracts following its 1980 increase in their annual renewal fees was approximately 5.0%. (RX 135S) However, this percentage is calculated by using only a five month period of cancellations whereas the denominator was the total of all renewals. The exhibit relied upon by Orkin shows that there were 10,739 cancellations during a five-month period, October, 1980 through February 1981. (RX 135S). This would be equivalent to a cancellation rate in excess of 12%. As of August 1, 1984, the actual cancellation rate of pre-1975 customers was approximately 5% per year (207,000 customers as of August 1980 less 164,402 customers as of August 1, 1984 equals 42,600 cancellations—42,600 divided by 207,000 equals 20.5%). [35]

67. By June of 1984, respondent had approximately 5700 customers with pre-1975 contracts or pre-1975 guarantees whose annual renewal fees had been rolled back to the amount indicated in their contract or guarantee, not including those customers who had entered into their pre-1975 contracts in 1968. (*See* F. 58-60; Respondent's Motion for Access, pp. 1-5 [filed June 28, 1984]; Raymond Dep. pp. 210-211, 105-108 and Dep. Exs. 19, 22) As of August 1984, a total of approximately 21,500 pre-1975 customers had their annual renewal fees returned to the amount specified in their contracts under Orkin's "accommodation" programs. (Childs' Aff. ¶ 8)

68. After Orkin had raised the annual renewal fees for pre-1975 contracts, Orkin considered making additional increases in the annual renewal fees of pre-1975 contracts. These latter increases did not occur. (Raymond Dep. pp. 187-192, 262-264 and Dep. Exs. 33, 34, 55; Rollins Dep. pp. 171-76 and Dep. Exs. 38, 39)

69. After Orkin had raised the annual renewal fees for pre-1975 contracts, Gary Rollins asked John Raymond to consider ways to convert pre-1975 customers to a new contract that would permit Orkin to raise the renewal fees again in the future. (Raymond Dep. pp. 239-240 and Dep. Ex. 46; Rollins Dep. pp. 197-201 and Dep. Ex. 46)

70. Orkin has comprehensive guidelines and procedures covering virtually every aspect and phase of its termite control services business. (RIR 46) (Orkin's guidelines and standards for the quality of services rendered under its termite guarantees have not differed depending on whether or not the consumer's termite contract was a pre-1975 contract. (RIR 46) Orkin has never considered a plan or proposal to reduce the quality of services ren-

dered under its pre-1975 guarantees. (RIR 47; Rollins Dep. pp. 72-73; Raymond Dep. p. 121)

71. Concerning the feasibility of a pre-1975 customer switching to another termite control company for the same guarantee as Orkin provided, Gary Rollins testified as follows:

> Do you have an opinion as to the feasibility of a pre-1975 customer switching to another termite control company and that company providing the same guarantee as Orkin for the annual fee stated in the customer's Orkin guarantee?
>
> MR. STATON: The original annual fee?
>
> MS. ALPHIN: The original annual fee stated in the Orkin guarantee.
>
> THE WITNESS: I would doubt that. [36]
>
> BY MS. ALPHIN:
>
> Q. You would doubt that a company would do that for a customer; is that correct?
>
> A. That's right.

(Rollins Dep. p. 210)

72. According to the Consumer Price Index, between 1966 and 1980, the cumulative inflation rate was over 170%. (RX 686) Costs of providing termite protection services rose constantly between 1966 and 1980. (Hromada Aff. ¶ 6; Nolen Aff. ¶ 9) During the period June 30, 1975 to June 30, 1979, Orkin's termite related costs increased 48.4%. (RX 45A, 46A, 48B, 650C; Rollins Dep. p. 51) However, Orkin has continued to realize a profit on its renewal business. (RX 650C) Based on the costs of pro-

viding termite renewal service in 1984, if Orkin were required to roll back all its pre-1975 customers to their initial annual renewal price, Orkin would experience an average loss per pre-1975 account per year of $10.93. (RX 649) Based on the costs of providing termite renewal service in 1984, even with the increased annual renewal price, Orkin lost an average of $2.91 per pre-1975 contract. (RX 649) If inflation continues and Orkin is prohibited from increasing its annual renewal fees on pre-1975 contracts, its losses on these accounts will continue to increase. (Boudreaux Aff. ¶ 4) Orkin's pre-1975 customers represent approximately one-third of its termite control services customers, but account for only one-fourth of its termite renewal revenues. These proportions will drop naturally over the years through attrition. (RX 94C)

73. Officials of at least seventeen states have questioned the legality of Orkin's increase of the annual renewal fees for pre-1975 contracts and pre-1975 guarantees. These states are Arkansas, Arizona, California, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Missouri, North Carolina, South Carolina, Texas, Virginia, and West Virginia. (RX 201A, 208B, 211A, 560, 579, 657A, 658, 659, 660A, 661A-E, 662A-C, 663A-C, 664, 665A-D, 666A-E, 667A-B, 668A-C, 669A-B, 670A-F; CX 200A, 203A-B, 228A-B, 248A-E, 388)

74. In a letter dated January 15, 1981, Roger W. Giles, Assistant Attorney General of Arkansas (CX 200 A-B), wrote to Orkin:

> The Arkansas State Plant Board has forwarded to this office information relating to several complaints against Orkin Exterminating Company as a result of the company's failure to comply with the terms of

Orkin's Lifetime Guarantee. Several individuals have complained to the State Plant Board that Orkin has refused to accept the annual renewal fee stated in the Lifetime Guarantee [37] Contract and that the company has increased the annual fee, thereby breaching the original agreement.

In addition to these complaints, this office has also received information concerning your attempt to increase annual fees on Lifetime Guarantee Contracts in North Carolina and the correspondence with the North Carolina Attorney General's Office. This office is in agreement with their opinion that the Lifetime Guarantee Contracts are valid, and that any contract modification can only be accomplished with the consent of both parties.

Therefore, this office must insist that the contracts entered into with the residents of the State of Arkansas be performed in accordance with their original terms.

(CX 200A)

In a letter dated March 9, 1981, Mr. Giles wrote to Orkin:

This letter will confirm our phone conversation of this date in which Rollins Inc. and the Arkansas State Plant Board agreed as follows:

1. Orkin Lifetime Guarantee contracts entered into prior to 1975 which did not specifically state that the annual renewal would increase will continue to be serviced at the rate stated on the contract if a representation was made to the purchaser at the

time of sale that the annual renewal fee would not be increased.

2. Any individual who did receive the representation can continue to receive service from Orkin at the same rate by furnishing Orkin with a signed statement so stating.

The Arkansas State Plant Board and this office will be advising everyone who has made an inquiry or who makes an inquiry in the future of this understanding with your Company.

(RX 658)

75. In a letter dated April 13, 1981, to Orkin, Annette M. Lassalle, Staff Attorney, Louisiana Department of Justice, stated, in part:

It is the opinion of this office that Orkin is bound by the renewal fees as stipulated in each client's contract. Hence, if any client has paid [38] a fee over that stipulated in his contract, he has overpaid and is due a refund by Orkin.

At this time we ask that you review your records and make the necessary adjustments or refunds to Louisiana clients.

(CX 203A)

76. Enclosed with Ms. Lassalle's letter of April 13, 1981, was a copy of Louisiana Attorney General's Opinion Number 81-03, which stated, in part:

The facts are as follows: Orkin has entered into a number of individual contracts with customers providing pest control service on an annual basis. These

> contracts stipulate that they may be renewed yearly for a renewal fee specified in each contract. Orkin now seeks to increase the stated renewal fee on the basis that their operating costs have increased. The contracts in question have absolutely no provisions for escalation of renewal fees.
>
> Considering Louisiana Civil Code articles and case law, it is the opinion of this office that Orkin is bound by their stipulated contract renewal fee and may not escalate that rate in contracts which do not have a rate escalation clause.

(CX 203B)

77. The State of Louisiana has brought suit against Orkin as a result of Orkin's increasing the annual renewal fees of pre-1975 contracts. In part, the suit seeks reinstatement of the annual renewal fees stated in the contracts and refunds of annual renewal fees collected by Orkin from customers whose fees were in excess of those stated in their contracts. (CX 205A-Z16)

78. In a letter dated April 10, 1981, Jay Laurence Lenrow, Assistant Attorney General of the State of Maryland, wrote to James M. Schneider, General Counsel of Rollins (Schneider Dep. p. 4), about Orkin's obligations under its pre-1975 contracts. Mr. Lenrow wrote:

> It is the opinion of this office that the contracts used by Orkin create a duty on the part of Orkin to renew its guaranty and inspect the home of any person tendering the pre-established Annual Renewal Fee.

* * *

[39]

This letter shall serve as notice pursuant to Md. Com. Law Code Ann. § 13-402 (1975) that the State of Maryland is offering your client the opportunity to conciliate this matter. Your failure to conciliate will force this office to seek injunctive and other relief pursuant to Md. Com. Law Code Ann. § 13-406 (1975).

(CX 211A-C)

In a letter dated May 18, 1981, John Henry Lewin, Jr., of Venable, Baetjer and Howard in Baltimore, wrote to Mr. Lenrow the following:

This will respond to your request for a statement of position by our client, Rollins Exterminating Co., known here as Orkin. . . .

The jurisdiction of the Attorney General is limited to those practices covered by the Consumer Protection Act, Md. Ann. Code, Com'l Law Art. § 13-101 *et seq.* This legislation was enacted in response to the "mounting concern over the increase of deceptive practices in connection with sales of merchandise and services and the extension of credit." Section 13-102(a). Further, the prohibited practices are defined as the "sale . . . of any consumer goods or consumer services;" and the "extension of consumer . . . credit . . . or the collection of consumer debts." Section 13-303. The unfair or deceptive trade practices, listed in some detail in § 13-301, enumerate those practices which would wrongfully induce a person to enter a contract—situations where, had the consumer known what the seller meant or intended, he would have had a different view of the deal.

> In the Orkin situation, however, there has been no violation of the Act. There have been no unfair or deceptive trade practices. Orkin fully intended to provide exactly the services sold at the price stated at the time of entering the contract. Orkin in no way misled or deceived any customer. Both parties to each contract had exactly the same view of the agreement—annual service at a fixed price.

(CX 212A-C)

In a letter dated October 3, 1984, Roger C. Wolf, Special Assistant Attorney General of the State of Maryland, wrote to Mr. Christian Achstetter [apparently an Orkin customer]: [40]

> The Federal Trade Commission has brought an action against Orkin and rather than duplicate efforts we are waiting the results of their action.

(CX 410)

79. In a letter dated October 23, 1980, Rebecca R. Bevacqua, Assistant Attorney General of the State of North Carolina, wrote to Mr. Schneider of Orkin that:

> The contract between Orkin and Mr. Schrimper is one for a *Lifetime* Control and Repair Guaranty which calls for annual reinspections upon payment of a set fee. The contract is neither perpetual nor indefinite in duration, being clearly limited by the term "Lifetime." Thus, the general rules you cited regarding contracts of indefinite duration are inapplicable.
>
> With regard to the fundamental equities involved, you have failed to take note of one very important consideration; Orkin used the set annual inspection fee as a key selling point for these pre-1974 contracts. The

fact that they could continue to pay only $20 a year was a material consideration justifiably relied on by Mr. Schrimper and other pre-1974 customers when they chose to contract with Orkin. We think a court would find it highly inequitable for Orkin to now claim that the contract does not mean what it led customers to believe it meant at the time it was signed.

We are not unsympathetic with the problems your company faces as a result of inflation. However, the fact that a party to a contract later discovers he made a bad bargain has never been grounds for rescission of the contract or unilateral changing of its terms.

Therefore, our position in this matter is that Orkin cannot increase its renewal prices on pre-1974 contracts unless the increase is agreed to by the customer.

(CX 218A-B)

In a letter dated December 9, 1980, the Office of the North Carolina Attorney General wrote:

We agree that all pre-1974 [sic] customers who (whether because of the wording of their contracts, statements in other documents furnished to them by Orkin, or statements made by Orkin personnel) relied on the fact that their annual renewal fees [41] would remain set and who objected to the increase would be allowed to continue paying the renewal fee stipulated in their contract.

(RX 667A-B)

In a letter dated April 13, 1981, Alan S. Hirsch, Assistant Attorney General of the State of North Carolina,

wrote to Jay Laurence Lenrow, Assistant Attorney General of the State of Maryland, which was carbon copied to James Schneider, Rollins' General Counsel:

> This is in response to your letter of April 8, concerning Orkin Exterminating Company. Enclosed you will find two letters, one dated October 23 and the other December 9, 1980, concerning this matter. The first letter indicates our position in regard to the legal justification of increasing Orkin contract rates. The second letter indicates an enforcement decision on our part not to pursue the matter in regard to those individuals that do not affirmatively object to the increase in rates. That we have made this enforcement decision in no way changes our view that Orkin is probably required to live by the letter of those contracts.
>
> I spoke to Jim Schneider of Orkin today and reaffirmed this position. I also informed Mr. Schneider that we in North Carolina reserved the right to reevaluate our enforcement decision should litigation in other states indicate our legal opinion is correct.

(CX 222, 351A-F)

In a letter dated April 14, 1981, James Schneider wrote to Alan Hirsch:

> Thank you very much for giving me the courtesy of a telephone call yesterday concerning your communications with Mr. Lenrow of the Maryland Attorney General's Office. Frankly, I was extremely upset concerning Mr. Lenrow's comments that I had advised him that North Carolina had approved my legal interpretation concerning Orkin's pre-1975 contracts. As

we discussed yesterday, this statement simply is not the least bit accurate, and I would not be so foolish as to misrepresent the same.

I am enclosing a copy of my letter to Mr. Lenrow dated April 3, 1981 which sets forth our accommodation program which was decided upon in concept prior to the written settlement with North [42] Carolina. As you will observe from the next to last paragraph, I am indicating that the modification has been accepted as a basis for resolving the issue with North Carolina as well as other jurisdictions. I am including a copy of a typical letter utilized with various jurisdictions to describe our modification program. I certainly hope that you will believe me when I say that at no time in the course of any communications, written or oral, with the State of Maryland or any other jurisdiction did I state that North Carolina or any other state had accepted our opinion as to the duration or meaning of Orkin's contracts.

(CX 220A-B)

80. In a letter dated January 27, 1981, the Office of Pima County (Arizona) Attorney, Consumer Protection-Economic Crime Division, wrote:

As your letter indicates that Orkin will treat its pre-1974 Arizona customers on the same basis as its North Carolina customers pursuant to an agreement with the Attorney General of the State of North Carolina, the above-referenced matter is deemed to have been settled in the public interest, and we will, therefore, close our file.

(RX 659)

81. In a letter dated December 11, 1980, Phillip L. Fairbanks, Assistant Attorney General of the State of South Carolina, wrote Mr. Schneider that:

> Simply stated, I believe the contracts we are concerned with are not perpetual. While the durational element is not fixed in terms of a particular number of years, it is clear that what the parties intended was a "lifetime guarantee," the lifetime being that of the home. This interpretation is borne out by explicit language contained in various of the documents involved. Given this conclusion, the case law relating to the enforceability of perpetual contracts is inapposite.
>
> * * *
>
> On the basis of the foregoing considerations, the position of this office is that Orkin's unilateral alteration of the price term in its Lifetime [43] Guarantee Contracts violates the South Carolina Unfair Practices Act.

(CX 228A-B)

82. In a letter dated February 24, 1981, George W. Stokes, Assistant Attorney General of the State of West Virginia, wrote Orkin that:

> The Consumer Protection Division of the Attorney General's Office has under investigation your increase in annual inspection renewal fees under your termite agreements.
>
> We have received complaints from different geographical areas of our State concerning your increase in such fees. The following allegations have been made against Orkin:

On or about May 6, 1968, you executed a "Termite Agreement" with one Mildred White, 1533 Smith Street, Milton, West Virginia 25541. The property was later acquired by Ernest R. Wheeler. The contract provided for "a nominal annual inspection fee of only $17.00." This fee was paid annually until the year 1981, at which time you increased the fee to $25.75.

On or about October 21, 1974, you executed a termite agreement with Mr. Frank Ruble, 816 Mulberry, Elizabeth, West Virginia 26143, which provided for an annual renewal fee of $30.00. This fee was paid each year. In the year 1981, you increased this annual fee to $43.26.

On or about October 10, 1974, you executed a termite agreement with Barry Wood, Post Office Box 53, Paw Paw, West Virginia 25434, which provided for an annual renewal fee of $41.00. This fee was paid until the year 1981. In the year 1981, you increased the annual fee to $57.68.

The above increases in annual renewal fees were made unilaterally by you and contrary to the express written contract you had with the consumers. The law is well settled in the State of West Virginia that a written contract is not subject to unilateral modification.

The above allegations, if found to be credible, constitute an unfair method of competition and a deceptive act and practice which is unlawful under [44] the West Virginia Consumer Credit and Protection Act.

(CX 238A-B)

On October 20, 1981, Orkin entered into an "Assurance of Discontinuance" with the State of West Virginia which provided, *inter alia,* that Orkin will not increase the annual renewal fees of customers in West Virginia who (1) have objected to the increase on the basis that salesmen represented to the customers at the time the contract was executed that the annual renewal fee would not be increased during the life of the premises covered by the contract, and (2) all [objecting] customers who believed by reason of the contract and supporting documents that the annual renewal fee would not be increased for the lifetime of the premises covered by the contract. (RX 670 A-F)

83. In a letter dated December 30, 1980, the Department of Health & Rehabilitative Services of the State of Florida wrote the following to Dudley J. Lamy (carbon copied to Orkin) concerning Mr. Lamy's complaint against Orkin:

> This department takes the position that since your subterranean termite treatment contract makes no reference to any change in renewal fee, and contains no contract termination date, the ORKIN company cannot increase the fee. Chapter 10D-55.105(2) ". . . the contract shall clearly set forth the following information:
>
> . . . (i) The total maximum price to be charged for treatment service, the exact annual renewal fees to be charged under the contract, if any . . ."
>
> Chapter 10D-55.142(1)(b): "Each licensee shall comply with the terms of each pest control contract it ussues [sic]."

> Therefore, your renewal fee, for the life of the contract, is $30.00, and cannot be raised as long as you keep the contract is force.
>
> By copy of this letter we are advising the ORKIN Exterminating Company, Inc., that to raise renewal fees, full disclosure of this intention must be included in the contract at the time of its issuance.

(CX 388)

84. In a letter dated January 28, 1981, the Office of the Attorney General of the State of Minnesota wrote to Mrs. C. W. Tousley, the holder of an Orkin pre-1975 contract: [45]

> Orkin has offered to honor its fixed 'life control' price, if a customer sends Orkin a letter indicating that at the time their services were sold, the sales people represented the renewal price would *not* be increased. The contact person at Orkin is James Schneider, General Counsel, P. O. Box 647, Atlanta, Georgia 30301, telephone (404) 873-2355.

(RX 665D) (emphasis in original)

85. In a letter dated July 9, 1981, the Office of the Attorney General of the State of Missouri wrote:

> According to prior correspondence that our office had with you, concerning a complaint registered by Mr. and Mrs. Johnny E. Russell, it was our understanding that you would maintain the constant renewal rate for those customers who indicated that they contracted for Orkin's services on the basis of a fixed renewal price.

(RX 666B)

86. Six states, Arkansas, Arizona, Minnesota, Missouri, North Carolina, and West Virginia, have indicated an acceptance of some form of accommodation for those Orkin customers who have complained about the increase in annual renewal fees on pre-1975 contracts to either Orkin or to state officials. (RX 658, 659, 665D, 666A-E, 667A-B, 670A-F) The North Carolina settlement with Orkin also was accepted by Arizona and Missouri. The North Carolina settlement provided as follows:

> (1) "Customers who objected to the increase" includes those who registered a complaint with our office, those who contacted the Rollins or Orkin offices in Atlanta by phone or mail to object, those who wrote or called one of the Orkin branch offices in North Carolina, and those who refused to send the amount listed on the renewal notice but mailed in a check for the amount they had paid in the past and which was set forth in their pre-1974 contract.
>
> (2) Our office will furnish you with a current list of all individuals who have complained to us, and either you or the Customer Service Department in Atlanta will contact them and resolve their complaints forthwith.
>
> (3) The Customer Service Department in Atlanta has records showing what individuals registered a complaint directly with the home office in Atlanta [46] and will contact these persons regarding their objections.
>
> (4) The branch office managers in North Carolina will be advised as to the agreed-upon resolution and will contact those customers who registered their objections at the local level.

(5) Orkin will furnish some written assurance to those customers whose renewal fees are to be held at the price stated in their pre-1974 contracts that no additional increase will be attempted.

(RX 667A-B)

II. CONCLUSIONS

A. *Summary Of The Facts*

(1) Description of Orkin and its Customer Contracts and Guarantees

The complaint in this matter was issued on May 8, 1984. It charged that Orkin Exterminating Company, Inc. ("Orkin"), in advertising, promoting, selling, and performing its termite-control services to consumers, agreed for the life of the consumer's structure, to reinspect the structure annually and, if necessary, to either retreat, or retreat and repair the structure, provided the consumer paid a specified annual renewal fee. In contradiction of these agreements, beginning in 1980 and continuing to the present, Orkin has raised, or attempted to raise, the agreed-upon annual renewal fees for its termite-control services. (Complaint ¶¶ 4, 5) These actions by Orkin are alleged to have caused substantial and ongoing injury to Orkin's customers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. As such, Orkin's acts and practices are alleged to constitute unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. (Complaint ¶¶ 6, 7)

Orkin has denied these allegations in its answer to the complaint filed June 18, 1984, and has asserted nu-

merous defenses, including that the Commission lacks subject matter jurisdiction over the complaint allegations, that the acts and practices complained of have not caused substantial and ongoing injury to Orkin's customers, that the alleged unlawful acts and practices have been encouraged, approved, and/or compelled by state and federal regulatory authorities and are therefore exempt from the Federal Trade Commission Act, and that the consumers [47] alleged to have been injured have recognized, accepted, and acquiesced to the alleged unlawful conduct under doctrines of waiver, estoppel, ratification, accord and satisfaction, limitations and latches. Orkin further contends that the relief proposed in the complaint is inappropriate, not in the public interest, and is not or would not be authorized by law.

Complaint counsel has now filed a motion for summary decision. Orkin has responded to complaint counsel's motion and has filed a motion for summary decision in its favor. Orkin also has submitted statements of material fact which Orkin contends either directly contravene complaint counsel's findings of fact or raise genuine issues of inference and legal significance that foreclose any entry of summary decision in favor of complaint counsel.

To the extent that there are factual disputes in this record, they relate to peripheral matters not necessary to a determination of the material issues to be decided in this matter. It is concluded, therefore, that there is no genuine dispute as to any material fact in issue and that it is appropriate to issue an initial decision based on the record as it has been submitted by the parties in their motions seeking summary decision.

Orkin provides pest-control and exterminating services throughout the United States, but mostly in the Southeast. In 1980, Orkin served customers located in 47 states and the District of Columbia. (CX 142C) As of September 1, 1980, Orkin operated approximately 294 branch offices and 44 district offices. (F. 2) Orkin is stated to be the world's largest termite and pest-control company, and has admitted that the acts and practices alleged in the complaint are in or affecting commerce. (F. 3, 4)

Orkin has entered into written agreements with its customers concerning the rendering of services to destroy or protect against termites, other wood-infesting organisms, moisture and wood decay. Under certain conditions Orkin has issued guarantees of its services. Only an officer of Orkin is authorized to change or vary the written terms of the pre-printed contracts and guarantees. (F. 8, 9, 10, 21) In general, prior to 1966, Orkin used pre-printed form contracts, and offered termite guarantees at a fixed price for continued protection to the treated property for a specified period which lasted from five to fifteen years. On or about January 1, 1966, Orkin began using the term "lifetime" in its termite contracts and/or termite guarantees. Earl F. Geiger, Vice Chairman of the Board of Rollins, Inc., who was Executive Vice-President of Orkin from 1964 to January 1976, introduced the "lifetime" guarantee concept to Orkin and proposed its adoption. (F. 11) [48]

Termite guarantees issued by Orkin include (1) a lifetime retreatment guarantee (LC Guarantee), (2) a lifetime retreatment and repair guarantee (LR Guarantee), (3) and a lifetime guarantee on pretreatment work on new construction (PR Guarantee). (F. 13)

The lifetime retreatment guarantee provides in part that at no extra cost to the customer Orkin will apply any necessary treatment to the premises if infestation occurs during the duration of the guarantee. The lifetime retreatment and repair guarantee provides in part that at no extra cost to the customer, Orkin will make repairs (up to a stated dollar maximum) to the structure and its contents in order to remedy any new damage caused by subterranean termites, provided that it is established that the new damage occurred after the initial treatment, and that at the time of discovery of the new damage, the damaged areas are infested with live subterranean termites. (F. 14, 15)

The lifetime guarantee on pretreatment work is the same as the LR Guarantee, except that Orkin's pretreatment guarantee is for new construction and its LR Guarantee covers existing structures. (F. 17) Generally, prior to 1969, Orkin's LR guarantees had a liability limitation of $25,000. In 1969, Orkin adopted a policy of issuing LR guarantees with a liability limitation of $100,000. (F. 16)

Orkin's termite contracts and termite guarantees provide for annual fees to be paid in order to continue the protection that is guaranteed. If the customer abides by the contract, and pays Orkin the specified annual renewal fee, the guarantee is to remain in effect. (F. 18) Orkin's termite contracts and termite guarantees, including those entered into prior to February 1, 1975, that used the term "lifetime", had a "structural modification" clause providing that in the event the premises were structurally modified, altered or otherwise changed after the date of initial treatment, the agreement would terminate unless a prior written agreement was entered into by the purchaser for Orkin

to reinspect the premises, provide additional treatment, and/or adjust the annual renewal fee. (F. 19) Before February 1, 1975, Orkin's termite contracts and termite guarantees that included the term "lifetime" did not mention adjustments or increases of the specified annual renewal fee necessary to continue the lifetime guarantees issued with respect to those contracts, absent the treated premises being structurally modified, altered, or otherwise changed after the date of initial treatment. (F. 20)

In approximately May of 1974, Orkin began revising its termite contract form(s) by adding a term or provision that provided for an increase of annual renewal fees that did not depend on whether the treated premises were structurally modified, altered or otherwise changed after the date of the initial treatment. The revised termite contract forms containing such a provision were first used in each of Orkin's sales districts on or about February 1, 1975. (F. 24) [49]

Thus, Orkin's contracts can be divided into three general categories which are relevant to this proceeding. Prior to 1966, Orkin utilized contracts and guarantees that provided for a guarantee for a fixed term of years, five to fifteen years, provided the customer paid the annual renewal fee specified in the contract. From 1966 to February 1, 1975, Orkin utilized the lifetime protection guarantee which provided for lifetime protection for the designated premises upon the payment by the customer of a specified annual renewal fee. These contracts did not provide for an increase in the annual renewal fee absent modification or structural change in the designated premises. Subsequent to February 1975, Orkin utilized contracts which provided that the specified annual renewal

fee could be increased after a five-year period. (RX 40A) This proceeding is concerned with those customer contracts and guarantees entered into during the period 1966-February 1, 1975 ("pre-1975 contracts" and "pre-1975 guarantees"), and Orkin's increase in the specified annual renewal fees in those contracts commencing August, 1980. (*See* discussion *infra*.)

(2) The Increase in Pre-1975 Annual Renewal Fees

In 1980, Gary W. Rollins, then President of Orkin, decided to increase the annual renewal fees of customers holding pre-1975 contracts and pre-1975 guarantees above the amount stated in the contracts and guarantees of those customers. (F. 38) Prior to increasing the annual renewal fees on pre-1975 contracts, Orkin requested that Arnall, Golden & Gregory, an Atlanta law firm, provide a legal opinion as to whether such an increase was permitted under the terms of the contracts. On or about December 13, 1978, Arnall, Golden & Gregory provided Orkin with a written legal opinion that its pre-1975 contracts appear to be of an indefinite duration and, as such, are terminable after a reasonable period of time. (F. 39) James M. Schneider, General Counsel of Rollins, Inc., reviewed the opinion given by Arnall, Golden & Gregory, and confirmed to management the conclusion reached therein. (F. 41) Mr. Gary Rollins reviewed the legal opinions prior to making his decision to increase the annual renewal fees for pre-1975 contracts. (F. 39)

Between 1978 and 1980, Orkin undertook an extensive expense reduction program before deciding, in February 1980, to increase the annual renewal fees on pre-1975 contracts. Also, during February 1980, Orkin increased by

40% the annual renewal fees for post-1975 customers whose contracts contained an express provision permitting such increases. (F. 42)

Prior to making his decision to increase the annual renewal fees of customers holding pre-1975 contracts and pre-1975 guarantees, Gary Rollins presented a synopsis of issues (dated February 7, 1980) on the subject of the increase to R. Randall [50] Rollins, who was then President of Rollins, Inc. In part, the synopsis states:

> Please find below and attached my analysis of the "pros and cons" regarding raising the renewal amount of our pre-1975 termite customers.
>
> PROS
>
> 1. Potential income increase of $2,286,614 (#232,-969 accounts valued at $6,017,406 × 40% increase less 5% cancellations)
>
> CONS
>
> 1. A few customers advised by salesmen and literature that renewal amount would be fixed.
>
> 2. State regulatory agencies (Pest Control, Consumer Protection, etc.) could interpret our contract in some cases to imply the renewal amount is fixed. Those who obtain old proposal information will discover we put this in writing.
>
> 3. Our longer term employees might feel that we are going back on our word.
>
> 4. There could be customer lawsuits and complaints.

OPTIONS

1. Leave as is.

2. Write customers and put on voluntary basis.

3. Meet with individual state regulatory and consumer groups to obtain understanding and raise.

4. Raise and handle exceptions.

(F. 43) Gary Rollins' recommendation to R. Randall Rollins, with which R. Randall Rollins concurred, was option 4 above, to raise the annual fees and handle the exceptions. (F. 44)

Beginning in August, 1980, Orkin began sending notices to approximately 207,000 customers holding pre-1975 contracts or pre-1975 guarantees, that Orkin was increasing the annual renewal fees over the amount specified in those customers' contracts or guarantees. All customers were notified of the increase well prior to their respective renewal dates. The notice of the increase of annual fees stated, in part: [51]

Dear Customer:

* * *

Through the past few years we have improved productivity to absorb our increased costs of gasoline, petroleum products, labor and increased government regulations. However, these increased operating expenses can no longer be totally absorbed while maintaining the high quality of service you deserve. Therefore, to maintain this quality protection, we now find it necessary to increase your annual renewal fee to the amount indicated on the enclosed Termite Renewal Invoice. We hope you understand

we would not increase your renewal fee unless it was absolutely necessary.

* * *

Sincerely,

/s/

Ron Kimbell
Director of Customer Service

(F. 46, 47) The annual renewal fees for pre-1975 contracts were increased to a minimum of $25.00 or by 40%, whichever was greater. (F. 50)

Orkin received communications from customers and customers' attorneys expressing their belief that Orkin did not have the right to increase annual renewal fees for pre-1975 contracts. Orkin has taken the position when customers have complained to it concerning the increase that Orkin had a right to increase the annual renewal fee, and Orkin had a policy of returning payments of customers who paid the amount specified in their contracts rather than the increased amount. (F. 51, 52)

Orkin used a form letter in responding to numerous customers who inquired about the increase of the annual renewal fees. The letter explained the rationale behind the increase. In part, the form letter stated:

> While our contracts prior to 1975 did not specifically mention increases, we believe that following a reasonable term of absorbing losses due to the impact of inflation, this increase is both consistent with law and reasonable business standards.
>
> * * *

[52]

We appreciate your concern and hope that you now understand our position and will submit your renewal payment to keep your coverage in force.

(F. 56) This form letter made no mention of exceptions being made to the increase of the annual renewal fees. (*See* F. 56)

(3) Exceptions to the Pre-1975 Annual Renewal Fee Increase

During 1968, Orkin promoted its services for protection against termites in a promotion called "Orkin 12." The Orkin 12 promotion was advertised in a pamphlet, on billboards, in magazines, and on radio and television. Orkin spent approximately $1,157,000 advertising Orkin 12. (F. 27)

The pamphlet concerning the Orkin 12 promotion was issued as point-of-sale material in presenting Orkin's services to its customers. The pamphlet contained the following language as point 6 (hereinafter "point 6"):

> LIFETIME GUARANTEE Orkin's lifetime termite protection plan includes annual reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection *is very modest and never increases.* In case of a sale, the guarantee is transferable.

(emphasis in original) (F. 28)

The Orkin 12 promotion was used and advertised in each of the following states plus the District of Columbia

during 1968: Alabama, Arkansas, Arizona, California, Colorado, Delaware, Florida, Georgia, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, Mississippi, Nebraska, North Carolina, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Wisconsin, and West Virginia. The Orkin 12 program was utilized in varying degrees by Orkin's branch offices and sales personnel. (F. 29) Literature containing point 6 of the Orkin 12 promotion was an attachment to Gary Rollins' synopsis to R. Randall Rollins, discussed above. Thus, Gary Rollins was aware of the Orkin 12 promotion at the time he wrote his synopsis to R. Randall Rollins. (F. 45)

On August 13, 1980, John Raymond, Orkin's Director of Administrative Operations, wrote to Orkin's branch managers concerning the increase of annual renewal fees for pre-1975 [53] contracts and the one exception to the increase which customers could invoke. In part, he wrote:

> If a customer tells you that our pre-1975 contract does not allow for an increase, you should explain that prior to the inflation spiral, practically no one had this provision in the contracts. Recent legal rulings interpret this as meaning that the renewal fee shall remain unchanged for a *reasonable period* which we interpret to be no more than five years.
>
> * * *
>
> If the customer states they have sales literature that specifically states there will not be an increase in the renewal fee, you should ask them to read the statement to you. Some customers sold between 1967 and 1968 were given a pamphlet that stated the

renewal fee would never increase. This statement was in the "Orkin 12 Point Plan." The statement, point number 6 says:

> 6. *Lifetime Guarantee.* Orkin's lifetime termite protection plan includes annual reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection is very modest and never increases. In case of a sale, the guarantee is transferable.
>
> If any of your customers tell you they have a pamphlet in their possession that prohibits an increase you should ask them to read to you the exact wording. If the wording is not verbatum [sic] as stated in "point 6" above they are, in fact, eligible for an increase. If their material does have this statement, and you confirm it, then tell the customer a computer mistake was made and a corrected bill will be sent. Ask them not to pay until a correct bill is received.

(emphasis in original) (F. 57)

In a memorandum dated December 11, 1980, John Raymond wrote to branch managers that Orkin was willing to make a further exception to the increase of annual renewal fees for pre-1975 contracts. In part, he wrote: [54]

> It is not our desire to stand in judgment of the motives and memories of our customers. While we believe most of our customers were little concerned with the modest price of the renewal at this earlier

time, we are willing to maintain the old renewal price for customers who state that at the time of purchase they relied on either a sales presentation or they construed the specific wording of the contract to provide that the renewal price would not be increased. We believe we are going beyond the letter as well as the spirit of the law in this matter and are willing to make this commitment provided that this exception to the general price increase is not abused. . . .

* * *

We are willing to make exceptions to give certain customers the benefit of the doubt. While we intend to be flexible in our evaluations, you should be alert to any abuses, particularly where complaints from customers exceed 1% of the affected customer base. You should be sensitive to potential abuses and discuss the matter with your District Manager. This exception program should be administered fairly and consistently in the interest of all our customers as well as the company.

(F. 58)

Attached to Mr. Raymond's memorandum of December 11, 1980, were procedures for granting an exception to the increase of annual renewal fees. The procedures, in part, were:

PROCEDURES FOR HANDLING - RENEWAL PRICE INCREASE EXCEPTIONS

1. The company will continue to bill for the renewal increase.

2. In the event of any complaints, the Branch will attempt to explain and justify this increase to our customers.

3. However, if a customer will not accept the rationale for the increase, we will honor their position and hold the renewal at the original rate, *provided* the customer will represent *in writing* his understanding at the time his or her contract was made. This is an exception and should be granted to those customers who bought our termite contract with [55] the understanding that the renewal fee was set and not subject to change.

(emphasis in original) (F. 59)

In a memorandum dated April 28, 1981, Linda Morton, Orkin's Manager of Policy and Procedure, wrote Orkin's branch, district and regional offices and stated, in part:

The increase of termite renewals for our older customers sold from January 1940 through December 1974 will end with the billing of our September renewal customers in July 1981.

Until then we will still need to address the problem of decreasing those customers who have a legitimate argument for not wanting to accept a price increase. The procedure for decreasing termite renewals was sent out by John Raymond - Orkin Operations - December 11, 1980 [referred to above].

The following procedure is a revision of that memo so please read it carefully. It is intended to simplify the process.

A. Please be sure to follow the procedure carefully in order to be sure that the customer's account is handled properly.

NOTE: This does not apply to contracts sold in 1975 or later. Beginning in 1975 our contract gave us the right to increase after five years. Those renewals are not to be decreased.

1. When the customer calls, determine the year of completion. If it is before 1975, attempt to explain and justify the increase to the customer.

2. If the customer strongly objects to the increase on the grounds that they were told at the time of sale that the renewal fee would never increase, explain that you will need to send them a letter from your Branch Manager and that you can decrease the renewal fee upon receipt of a written request from them.

(F. 60) [56]

In a memorandum dated March 2, 1981, R. M. Russell, Vice-President of Government Relations for Orkin, suggested to Gary Rollins that customers whose contracts were entered into in 1968 should no longer be sent notices for increased annual renewal fees. In part, he wrote:

As we are now primarily through our renewal increase program, I think it might be to our advantage to consider dropping 1968 contracts towards renewal increase for the remainder of the program. This would give us some base to show our good intent in any future litigation regarding this program. Even if we do stop now, all months will have

received two or more notices. In my opinion, the possible reduction in renewal collections would be worthwhile towards our future negotiations and possible litigation.

(F. 61)

From August 1981 through July 1982, Orkin rolled back the increase of annual renewal fees of all customers who had entered into their pre-1975 contracts in 1968. Customers were notified of the rollback by an insert included in the renewal notice that was sent two months prior to the anniversary month of their contracts. Customers who had paid an increased rate during the previous year were given credit for the amount of the increase. (F. 62) Customers who qualified under Orkin's further exception to the fee increase also had their annual renewal fees rolled back. The record is silent as to whether this latter group of customers received credit for any increased fees they may have paid.

(4) Results of the Increase in Pre-1975 Annual Renewal Fees

By May 25, 1981, Orkin had received payments of annual renewal fees of $1,257,629 in excess of the sum of the amounts specified in pre-1975 contracts of customers who paid their increased annual renewal fees. (F. 64) As of that date Orkin had received payments of annual renewal fees of $113,615 in excess of the sum of the amounts specified in pre-1975 contracts of customers who entered into their contracts in 1968 and who paid their annual renewal fee. As of November, 1981, approximately 170,000 customers, or 82.1%, of pre-1975 customers had paid the increased price or the frozen

price. Other statistics indicated that as high as 87% of such customers had paid. During its fiscal year ending on June 30, 1983, by June 20, 1983, Orkin had received payments of annual renewal fees of $959,158 in excess of the sum of the amounts specified in pre-1975 contracts of customers who paid their annual fees. Through 1984, Orkin has estimated that it received $7,515,764 from the increase in pre-1975 customers' annual renewal fees. (F. 65) [57]

Approximately 15,832 customers had their annual renewal fees returned to the level specified in their contracts because of the Orkin 12 promotion. (F. 63) Approximately 5,700 other pre-1975 customers had their annual renewal fees rolled back in accordance with Orkin's accommodation program. Thus, as of August, 1984, a total of approximately 21,500 pre-1975 customers had their annual renewal fees rolled back to the original renewal fee specified in their contracts. (F. 67)

By August 1, 1984, Orkin had approximately 164,402 customers with pre-1975 contracts and pre-1975 guarantees, of which 142,908 were paying the increased fee. (F. 66) Approximately 80% of the pre-1975 customers were making annual renewal fee payments as of August 1, 1984. Orkin's cancellation rate on its termite contracts is normally 5.8% overall and 5.2% on contracts that have been in force over five years. (RX 40A) Orkin had cancellations on its pre-1975 contracts following its 1980 annual renewal fee increase of 10,739 through the renewal months of October 1980 through February 1981. (RX 135S) Extrapolated over the entire year would give Orkin a cancellation rate on pre-1975 contracts in excess of 12% during this first year of the

fee increase. However, over a four-year period, 1981-1984, the cancellation rate approximated 5% per year. (F. 66)

According to the Consumer Price Index, between 1966 and 1980, the cumulative inflation rate was over 170%. (RX 686) Costs of providing termite protection services rose constantly between 1966 and 1980. During the period June 30, 1975 to June 30, 1979, Orkin's termite renewal costs increased 48.4%. Based on the costs of providing termite renewal service in 1984, if Orkin were required to roll back all its pre-1975 customers to their initial annual renewal fee, Orkin would experience an average loss per pre-1975 account per year of $10.93. Based on the costs of providing termite renewal service in 1984, even with the increased annual renewal fee, Orkin lost an average of $2.91 per pre-1975 contract. If inflation continues and Orkin is prohibited from increasing its annual renewal fees on pre-1975 contracts, its losses per pre-1975 customer will continue to increase. Orkin's pre-1975 customers represent approximately one-third of its termite control services customers, but account for only one-fourth of its termite renewal revenues. This proportion will drop naturally over the years through normal attrition. (F. 72)

B. *Orkin's Contract Terms*

Commencing in 1966 and continuing through February 1, 1975, Orkin adopted a lifetime guarantee plan in connection with its sales of termite control services. The guarantee provided in the contracts would remain in effect for the lifetime of the treated premises so long as the customer paid a specified annual [58] renewal fee. These

lifetime guarantees were designed to offer consumers additional services over existing contracts which limited the guarantee to terms of 5 to 15 years if the customer paid the annual renewal fee. (F. 12) These "pre-1975 contracts" offered lifetime guarantees and were silent as to any increase in annual renewal fees, with one exception. If the treated premises were modified or structurally changed, the contract would terminate unless a prior written agreement were entered into providing for a reinspection of the premises by Orkin and an adjustment in the annual renewal fee.

Numerous copies of Orkin's contracts are in the record. The terms and conditions of several of these contracts have been set forth in the Findings of Fact. (*See* F. 22) Examples of these terms and conditions include:

> CX 3, a contract dated March 23, 1968, offers a "Lifetime Control and Repair (LR)" guarantee, and has the following statement:
>
> ORKIN CONTINUOUS PROTECTION GUARANTY
>
> Under Orkin's Continuous Protection Plan, the above named property will be reinspected in *November 1968* upon prompt payment of *$18.00* (plus tax where applicable $.....), and annually thereafter in *November* upon payment of *$18.00* (plus tax where applicable $.....), beginning in *1969*.
>
> RX 571A, a contract dated March 11, 1971, offers a "Lifetime Control (LC)" guarantee, and has the following statement:

ORKIN CONTINUOUS PROTECTION
GUARANTY

Under Orkin's Continuous Protection Plan, the above named property will be reinspected in *Mar. 72* upon payment of Paid (plus tax where applicable $.....), and *annually* thereafter in *Mar.* upon payment of $35.00 (plus tax where applicable $.....) beginning in *1974.*

CX 414A, a contract dated February 5, 1972, offers a "Lifetime Control and Repair (LR)" guarantee, and has the following statement:

ORKIN CONTINUOUS PROTECTION
GUARANTY

Orkin's Continuous Protection Guaranty will provide protection for the above named property including Annual Reinspections upon payment of the initial charges and an Annual Renewal Payment of *$37.00* starting *February 1973* and each February thereafter. [59]

(*See also* CX 421A, [contract dated October 1972]; CX 439A [contract dated May 1972]; RX 562A [contract dated October 1971]; all which have terms identical to those of CX 414A, set forth above.)

CX 205W, a contract dated July 3, 1974, offers a "Lifetime Control (LC)" guarantee, and has the following provision:

ORKIN CONTINUOUS PROTECTION
GUARANTEE

The guarantee checked above will be issued to the buyer upon completion of initial treatment. The Guarantee will cover the above named premises and will be

subject to the General Terms and Conditions on the reverse side hereof. Its coverage, including annual reinspection, will be effective for a period of *2* years upon payment of the initial charges and thereafter for a period of *LIFE* years, so long as renewal payments of *$20* are made annually.

(The italicized words were handwritten.)

The only logical interpretation of this plain language in the Orkin "pre-1975" contracts is that Orkin has contracted to provide lifetime protection for the treated premises for a fixed annual renewal fee. As long as the customer paid the specified annual renewal fee, the guarantee would continue, absent modification or structural changes in the premises.[2] The words [60] used in the contracts are words

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2. Ron Kimbell, Director of Rollins Customer Service, in a letter dated August 11, 1980, wrote to Gary Rollins concerning customer complaints about the annual renewal fee increase:

> Several of the customers' phone calls and letters implied some things that caused me to review the contracts used from 1968 to present.
>
> * * *
>
> After reviewing these contracts (not the guarantees) I have concluded that the pre-1975 increase is more questionable than ever. Several of the statements are leaning more towards the implication of no increase ever, than a possible increase at a later date.

(F. 53)

James M. Schneider, Rollins General Counsel, testified on February 8, 1985, that during the fall of 1978 he was shown an Orkin contract and asked whether there was a basis for increasing the renewal price. His reaction was:

> Well, I looked at the contract, and I recall that my reaction was the reaction that—or my initial reaction was that of most people that reviewed the contract, I didn't see offhand a basis for increasing the prices. The provision concerning the renewal prices appeared to be of indefinite duration using words like "hereafter" or "thereafter," and my instant or immediate reaction was there simply was not a basis for increasing the prices. **(F. 55)**

that Orkin itself originated, and they must be given their customary and usual meaning, unless it is shown that the parties used them in a different sense. 17A C.J.S., Contracts Section 301. The contracts use ordinary English words, not technical or scientific words, and it is not necessary to have extrinsic evidence as to their meaning. *Restatement (Second) Contracts,* 1979, Section 212, Comment d. The interpretation and construction of contracts or agreements is within the province of the administrative law judge and the Commission. *See Amrep Corp.*, 102 F.T.C. 1362, 1663-64 (1983); *Horizon Corp.*, 97 F.T.C. 464, 842-846 (1981).

Respondent Orkin has admitted that the term "lifetime" as used in its contracts and guarantees is for the lifetime of the treated premises. It is admitted that the contracts contain a specified annual renewal fee in order to maintain the lifetime guarantee in effect, and that there is no provision for an increase in the annual renewal fee, absent structural modification or change. Thus, the Orkin contracts provide a lifetime guarantee at a set annual renewal fee. The contracts are neither indefinite nor perpetual, being clearly limited by the term "lifetime."

Orkin contends that the term "lifetime," as used in its pre-1975 contracts, does not refer to the time that the annual renewal fee will be maintained at any particular level. (Resp. Brief, p. 43) By this argument Orkin is attempting to separate the analysis to be given the contract. The contract must be interpreted as a whole; it offers lifetime protection at a stated annual fee. *See Restatement (Second) of Contracts* Section 202(2); *Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d 856, 860-61 (Utah 1978). Orkin also argues that no one at Orkin who participated in the decision to offer a "lifetime" guarantee on its pre-

1975 contracts intended that the initially stated annual renewal fee would never be increased for the lifetime of the contracts (Resp. [61] F. 13, 14),[3] that its sales personnel were never instructed by anyone at Orkin that the annual renewal fees on its pre-1975 contracts were fixed, that they were never instructed to make such representations to customers, and that they never made such representations to customers. (Resp. F. 13, 14, 29, 30)

The interpretation to be given Orkin's contracts raises a question of law, not fact. While the plain language of the contracts does not require extrinsic evidence of the intention of the parties to the contract, the record presents undisputed evidence of Orkin's interpretation of its contracts at the time they were being utilized.

The Orkin 12 promotion is compelling evidence that Orkin intended the contracts to provide for a lifetime guarantee at a fixed annual renewal fee. The Orkin 12 advertising campaign was directed at a lifetime fixed annual renewal fee. The point-of-sale pamphlet stated:

> LIFETIME GUARANTEE. Orkin's lifetime termite protection plan includes annual reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection *is very modest and never increases.* In case of a sale, the guarantee is transferable.

(Kimbell Dep. Ex. 9; Raymond Dep. Ex. 6) (emphasis in original)

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3. "[T]he intention of a party that is relevant to formulation of a contract is the intention manifested by him rather than any different undisclosed intention." Restatement (Second) of Contracts Section 200 Comment B.

Orkin attempted to implement uniform sales techniques for its sales people. (Raymond Dep. pp. 26-41 and Ex. 1-5) It was Orkin's company policy that new salesmen should be given "Termite Sales Training Lessons 1-6."[4] (Raymond Dep. p. 3? and Ex. 4) Termite Sales Training Lesson #4 contained the following:

> HOW DOES THE CUSTOMER BENEFIT FROM ORKIN'S SUBTERRANEAN TERMITE TREATMENT?
>
> A. They receive a lifetime guarantee protection which is non-cancellable by Orkin and renewable by customer's option. [62]
>
> B. Their cost of the renewal remains the same so long as renewal payments are made annually.
>
> * * *
>
> E. The guarantee is transferable if they sell their home.

(Raymond Dep. pp. 39-40 and Dep. Ex. 5) Termite Sales Training Lesson #5 also instructed branch salesmen that "(y)ou should always figure the price for Orkin Service by the Termite Pricing Schedule." (Raymond Dep. Ex. 5) Two pricing schedules to be used by Orkin salesmen in pricing annual renewal fees have the following statement:

> *Important* - You are selling a *non-cancelable*, lifetime guarantee. (SX 384B, 385C) (emphasis in originals)

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4. "Termite Sales Training Lessons 1-6" apparently were in use as late as 1973. (*See* F. 35)

These pricing schedules have revision dates of October, 1971, and May, 1973.

Form letters issued by Orkin to customers reflect Orkin's interpretation of its contracts and guarantees, and the representations made to consumers. CX 205U is a form letter dated April 23, 1967, issued to a customer located in New Orleans, Louisiana. RX 30 is a form letter dated January 3, 1970, issued to a customer located in Tucson, Arizona. RX 31 is a form letter dated September 26, 1968, issued to a customer located in Cayce, South Carolina. RX 561F is a form letter dated October 27, 1971, issued to a customer located in Summerville, South Carolina. RX 581F is a form letter dated March 1, 1971, issued to a customer located in Bethesda, Maryland. RX 30 has a form revision date of February 1969; RX 561F has a form revision date of January 1970. These form letters state, in part:

> As the owner of an Orkin-treated building, you may continue protection from year to year thus assuring virtually lifetime protection against reinfestation. . . .
>
> * * *
>
> The cost of Orkin's Lifetime Guarantee is modest - a nominal annual inspection fee of only $31.00 relieves you of all further termite worries.

(RX 30, *see also* CX 205U, RX 31, 561F, 581F; F. 23)

Significantly, when Gary Rollins made his recommendation to R. Randall Rollins to increase the annual renewal fees for all pre-1975 contracts, he specifically noted that "a few customers" were advised by salesmen and literature "that the renewal amount would be fixed." He stated that "those who obtain old proposals [63] informa-

tion will discover we put this in writing." He also stated that "our longer term employees might feel that we are going back on our word." (F. 43)

Based on the plain language of the Orkin pre-1975 contracts and the undisputed evidence set forth above, it is concluded that the annual renewal fees were fixed for the lifetime of the treated premises, that Orkin intended that the annual renewal fees be fixed, and that such representations were made to customers through advertising and by sales representatives. This conclusion is buttressed by the fact that Orkin rolled back the annual renewal fee increases for all 1968 customers based on the Orkin 12 promotion. (F. 62) Another 5700 pre-1975 customers convinced Orkin to roll back their annual renewal fee increase based on their understanding of the contracts and the representations made by sales representatives. (F. 67) Testimony also has confirmed that customers believed, or were told, that the annual renewal fee was fixed. (*See* Bourgeois Dep. p. 23; Edwards Dep. p. 30; Landry Dep. p. 63; Hoffman Dep. p. 29; Thompson Dep. pp. 20-21; Terrebonne Dep. pp. 19-20.)

Orkin's contention that the pre-1975 contracts are of an indefinite duration and terminable after a reasonable time (Resp. Brief, p. 45) is unpersuasive. Orkin's contracts must be read in their entirety to determine if there is any ambiguity. The contracts speak in terms of the treated property. The type of guarantee to be issued is "Lifetime." The contracts provide that:

ORKIN CONTINUOUS PROTECTION GUARANTY

Under Orkin's continuous Protection Plan, the above named property will be inspected in *Nov. 68* upon

payment of $..... (plus tax where applicable $.....), and annually thereafter in *Nov.*, upon payment of *$15.00* (plus tax where applicable $.....), beginning in *1969*.

(CX 429A)

The contract also states:

The Guaranty checked above [Lifetime Control and Repair (LR)] will be issued and delivered to the purchaser upon completion of initial treatment. Guaranty will be effective so long as payment is made in accordance with the Terms and Conditions of this Service Order.

(CX 429A)

Under the language of the contracts, quote sic above, the duration of the guarantee is fixed; it is the lifetime of the treated property. Orkin, one party to the relevant contracts, [64] has admitted that the lifetime of the treated property is the interpretation to be given the duration of its contracts (*see* Resp. F. 6, 7), and complaint counsel agrees with this interpretation. The ~~lifetime~~ guarantee is to continue "so long as payment is made in accordance with the Terms and Conditions" of the contract.

Words which fix an ascertainable fact or event, by which the term of a contract's duration can be determined, make the contract definite and certain in that particular.[5] 17 Am. Jur. 2d, Contracts Section 80 The

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5. To the extent there is any ambiguity in the meaning of the contracts, the ambiguity must be resolved against Orkin, who prepared the form contracts. Restatement (Second) Con-

(Continued on following page)

payment of an annual renewal fee is a condition precedent to continuation of the contract. Payment of the annual fee obligates Orkin to perform according to the terms of the contract, which is to provide lifetime protection against termite infestation to the *designated property*. This is not only the interpretation which Orkin gives its contracts, but it is obviously the manifest intent of the parties to the contracts. Any interpretation of the term "lifetime" to be anything less than the lifetime of the treated property would be an injustice to the plain meaning of the word and the intent of the parties expressed within the four corners of the contract.

The mere fact that an obligation under a contract may continue for a very long time is no reason in itself for declaring the contract to exist in perpetuity or for giving it a construction which would do violence to the expressed intent of the parties. Where it appears that the parties did in fact intend that the obligation terminate at an ascertainable time, the courts, in effect, will supply the missing clause and construe the contract accordingly. *Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc.*, 178 F.Supp. 655, 661 (S.D.N.Y. 1959), *aff'd per curiam* 280 F.2d 197 (2nd Cir. 1960) The lifetime of the treated structure is sufficiently definite to be enforceable.

Footnote continued—

tracts Section 206; A. Corbin, Corbin on Contracts, 527 (One Volume Edition 1952). This is especially true in the case of Orkin, which had earlier utilized contracts which did provide for a definite number of years—five to fifteen—for its guarantee to continue. (F. 11) Adopting the term "Lifetime" and omitting the definite number of years previously used in its contracts, indicates Orkin's intentions were to offer a lifetime guarantee.

It is concluded that the Orkin contracts can be renewed annually at the option of the owner of the treated premises for the life of the treated premises upon payment of the fixed annual renewal fee stated in the contracts. [65]

C. *Orkin's Acts and Practices Violate Section 5*

(1) Breach of Contract Can Constitute a Violation of Section 5

Orkin asserts that a non-deceptive breach of contract does not violate Section 5 of the FTC Act and that this proceeding constitutes the first attempt by the Commission to apply Section 5 to such a practice.[6] This unprecedented attempt to extend the scope of Section 5 is wholly unauthorized and improper, according to Orkin. Orkin relies on several decisions involving interpretations of "little FTC Acts" by the courts; namely, *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981); *Stearns v. Genrad Inc.*, 1984-2 Trade Cas. ¶ 66,294 at 67,266, 67,270; *CF Industries, Inc. v. Continental Gas Pipe Line Corp.*, 448 F.Supp. 475, 485 (W.D. N.C. 1978); *Coble v. Richardson Corp. of Greensboro*, 322 S.E.2d 817 (N.C.App. 1984), interpreting the North Carolina Unfair Trade Practice Act, N.C. Gen. Stat. Section 75-1.1(a)(1981); and *Pepsi-Cola Metropolitan Bot-*

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6. There have been numerous Commission proceedings where breach of contract has been held to be unfair, but usually in the context of other challenged practices. *See Jay Norris Corp.*, 91 F.T.C. 751, 848 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979) (failure to consistently meet guarantee claims of prompt delivery as well as money back guarantees); *Skylark Originals, Inc.*, 80 F.T.C. 337, 350 (1972), *aff'd*, 475 F.2d 1396 (3rd Cir. 1973) (failure to promptly honor money back guarantee as represented in advertisements and catalogs).

tling Co. v. Checkers, Inc., No. 83-1422 (1st Cir. Jan. 28, 1985), interpreting the Massachusetts statute, Mass. Gen. Laws ch. 93A.

The North Carolina Unfair Trade Practice Act tracks the language of Section 5 of the FTC Act, and the North Carolina courts look to the decisions of the Commission and the federal courts under Section 5 in interpreting the North Carolina statute. The Massachusetts statute provides that the courts in construing the state statute are to be guided by the decisions of the Federal Trade Commission and the federal courts in construing the FTC Act. Mass. Gen. Laws ch 93A Section 2(b) However, the reverse is not true, the Commission does not look to the interpretation of state statutes in interpreting its organic Act. Indeed, the Commission can find a practice unfair even where it is authorized under state law. *Spiegel, Inc. v. FTC*, 540 F.2d 287, 292 (7th Cir. 1976). In *Peerless Products v. FTC*, 284 F.2d 825, 827 (7th Cir. 1960), *cert. denied*, 365 U.S. 843 (1961), the court held:

> Unless Congress specifically withdraws authority in particular areas, the Commission, upon its general grant of authority under 15 U.S.C.A. § 45(a)(6), [66] can restrain unfair business practices in interstate commerce even if the activities or industries have been the subject of legislation by a state or even if the intrastate conduct is authorized by state law.

The North Carolina courts, the Massachusetts courts, and federal courts reviewing cases under the "little FTC" statutes, have held that mere breaches of contract, without more, do not violate the respective state statutes. In *State ex rel. Edminsten v. J.C. Penney Co.*, 292 N.C.

311, 233 S.E.2d 895 (1977), the North Carolina Supreme Court held that the North Carolina statute is directed only at the sale of products, and the debt collection practices which were challenged in the proceeding followed a sale and were not part of a sale, and not within the statute.[7] In a later case, *Johnson v. Phoenix Mutual Life Insurance Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980), the court broadened its interpretation of the statute to include a contract between a mortgage broker and a borrower. In *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981), the court repeatedly described the statute as a protection for consumers.

In *Coble v. Richardson Corp. of Greensboro, supra*, a purchaser brought suit against a real estate development company for damages resulting from breach of warranty and unfair and deceptive trade practices in connection with the sale of a single-family residence. The purchaser was awarded compensatory damages, but the North Carolina Court of Appeals refused to award treble damages under the North Carolina Unfair Trade Practice Act. The court, in rejecting a claim of unfairness, used language somewhat similar to the language of the *Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction,* letter to Senators Wendell H. Ford and John C. Danforth, dated December 17, 1980. The court, in *Coble,* stated:

> Although unfair conduct that is neither deceptive nor fraudulent may constitute an unfair trade practice, the evidence at bar did not rise to the level of unfairness as that concept has been defined by our courts. "A

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7. There was a strong dissent in the case stating that the majority decision read "unfair" out of the statute.

practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980). "[A] party is guilty of an unfair act or practice when it engages in conduct that amounts to an inequitable assertion of its power or position." *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 [67] N.C.App. 695, 700, 303 S.E.2d 565, 569, *cert. denied*, 309 N.C. 321, 307 S.E.2d 164 (1983).

The case before us involves a breach of contract based on written warranties and oral representations that were essentially restatements of what defendant was already bound to do under the warranty. There is nothing so oppressive or overreaching about defendant's behavior in breaching the contract that would transform the case into one for an unfair trade practice.

The federal courts give credence to the North Carolina courts' interpretation of their own statute. In *CF Industries v. Transcontinental Gas Pipe Line Corp.*, 448 F.Supp. 475 (W.D.N.C. 1978), the district court considered the *J.C. Penney* decision, referenced the dissent in the case, and concluded that under *J.C. Penney*, the statute provided a remedy where a contract is *obtained* as a result of a violation of the statute, but no remedy where the violation is unrelated to the contract's formation. The court stated, in respect to the breach of contract:

Whatever may be the case generally, the court concluded that on the mere allegation of deliberate or intentional refusal to procure and deliver natural gas,

> without any suggestion of deception or any claim of injury to competition, plaintiffs have not stated a claim under [the N.C. "little FTC Act"]. 448 F. Supp. at 485

In *United Roasters v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981), the Fourth Circuit Court of Appeals considered an intentional breach of a contract, and concluded:

> Remaining to be determined, however, is whether Colgate's acts were unfair or deceptive within the meaning of § 75-1.1. It is clear that the statute encompasses such things as misrepresentation and a wide variety of shady practices sometimes associated with the marketing of consumer goods and services. Whatever the limit of their reach, however, the words must mean something more than an ordinary contract breach.
>
> In a sense, unfairness inheres in every breach of contract when one of the contracting parties is denied the advantage for which he contracted but this is why remedial damages are awarded on contract claims. If such an award is to be trebled, the North Carolina legislature must have intended that substantial aggravating circumstances be present.
>
> * * *
>
> [68]
>
> The contract here was carefully negotiated and drawn by sophisticated parties. There is no hint of any unfairness to either party before Colgate's cessation of performance. It then broke the contract, but we cannot conclude that unfairness inhered in the circum-

> stances of the breach within the meaning of the statute simply because the breach was intentional and not promptly disclosed.

In a very recent decision, the Fourth Circuit, in *Stearns v. Genrad, Inc.*, 1984-2 Trade Cas. ¶ 66,294 at 67,266 (4th Cir. Nov. 20, 1984), held:

> The statute has been construed as directed against deception in connection with the sale of goods. *Id.* at 67,269
>
> Even if there had been an intentional breach of the distribution contract by Genrad, that would not have been a violation of the North Carolina statute. *Id.* at 67,270

Thus, the present interpretation of the North Carolina "little FTC Act" is that an intentional breach of a contract, *without more,* is not actionable under that statute.[8] However, the interpretation of the North Carolina statute offers little guidance as to the interpretation to be given the FTC Act. The North Carolina statute differs in a substantial way from the FTC Act; the North Carolina statute grants standing to sue under Section 75-1.1 to individuals, firms and corporations, and also provides for treble damages where a violation has been found. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397, 402 (1981). Interpretations of the two statutes differ substantially; for

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8. Massachusetts courts have reached similar conclusions. *Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc.*, No. 83-1422 (1st Cir. Jan. 28, 1985, slip op. at 10) These state precedents, involving as they do the breach of a single consumer contract, or a breach of contract between two commercial enterprises, offer no assurance as to how the state statutes would be construed where the breach of contract affects the rights of hundreds of consumers.

example, debt collection practices, held not to be within the scope of the North Carolina statute, *J.C. Penney, supra,* have long been held to be within the ambit of Section 5. *See Floersheim v. FTC,* 411 F.2d 874 (9th Cir. 1969); *Spiegel v. FTC,* 540 F.2d 287 (1976); *Capax, Inc.,* 91 F.T.C. 1048 (1978). The FTC Act applies broadly to deceptive acts and practices and to unfair acts and practices; it is in no way limited to practices connected directly to the sale of products, the interpretation given the North Carolina statute. [69]

Orkin's reliance on state court decisions has little relevance in this proceeding, and in no event do state court decisions foreclose a contrary FTC Section 5 decision.[9] *FTC v. Sperry & Hutchison Co.,* 405 U.S. 233, 239 n. 4. Thus, Orkin's breach of contract must be measured against the Commission's policy on unfairness, not court interpretations of state statutes.

The Commission has stated:

> Unjustified consumer injury is the primary focus of the FTC Act, and the most important of the three *S&H* criteria. By itself it can be sufficient to warrant a finding of unfairness.

Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, p. 5 ("Unfairness Statement").

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9. There are two state proceedings against Orkin arising out of facts similar to the facts in this proceeding. *Orkin Exterminating Company v. Dept. of Health and Rehab. Services,* Case No. 81-389 (Fla.Cir.Ct. October 21, 1981), *aff'd per curiam* (Fla.Dist.Ct.App. 1982). (Orkin enjoined from raising renewal fees for customers holding form contracts in stipulated record—CX 248A-E), and *State of Louisiana v. Orkin Exterminating Co.,* Case No. 83-2166 (Dist. Ct. for the Parish of Orleans) (Pending) (CX 205A-Z16).

In *International Harvester*, the Commission set forth three tests for determining whether consumer injury is legally unfair. It must be:

> (1) substantial; (2) not outweighed by any offsetting consumer or competitive benefits that the practice produces; and (3) one which consumers could not reasonably have avoided.

International Harvester Co., 3 Trade Reg. Rep. (CCH) ¶ 22,217 at 23,181 (December 21, 1984).

If Orkin's acts and practices violate Commission policy on unfairness, a violation of Section 5 has been established.

(2) The Injury to Consumers was Substantial

Beginning in August, 1980, Orkin increased the annual renewal fees of its pre-1975 customers by 40% or to a minimum of $25.00, whichever was greater. The price increase notice was sent to approximately 207,000 customers. (F. 46) Approximately 21,500 pre-1975 customers had their renewal fees rolled back to [70] the original contract level under programs initiated by Orkin after the fee increase had become effective. (F. 67) As of August 1, 1984, Orkin had approximately 142,902 customers with pre-1975 contracts whose annual renewal fees had been increased. (F. 66) By May 25, 1981 Orkin had received $1,257,629 in annual renewal fees in excess of the sums of the amounts specified in the pre-1975 contracts which were renewed. (F. 64) Orkin has estimated that its increased renewal revenue through 1984 from the fee increase to its pre-1975 customers will be $7,515,764. (F. 65)

The injury sustained by individual customers over the years has been and will continue to be substantial. While each customer's increase in the annual renewal fee may

have been small, the customer is faced with paying this increased amount each year to retain the guaranteed protection. The Commission has stated that an injury may be substantial if it does a small harm to a large number of people. Further, Orkin has considered ways to increase the annual renewal fee again. (F. 68-69) Such action would heighten consumer injury. Under these criteria, the injury caused by Orkin's breach of its pre-1975 contracts is substantial.

(3) Consumers could not Reasonably have Avoided Injury

All of Orkin's pre-1975 contracts were preprinted forms. Orkin sales personnel did not have the authority to vary or change the forms. (F. 10) The contracts provided that payment of the annual renewal fee specified in the contract would continue the protection for the lifetime of the treated property. The form contracts did not state that Orkin reserved the right to raise the annual renewal fee. In fact, Orkin promoted its lifetime guarantees as having a fixed annual renewal fee. Since Orkin's customers could not have foreseen that Orkin would increase the annual renewal fee at some future date, they could not have reasonably avoided the injury. When Orkin sent the notice of the increase in annual renewal fees to its pre-1975 customers, the customers had no choice in the matter other than to pay the increased fee, or lose the guaranteed protection.[10] If the customer paid the fee specified in the customer's contract, Orkin returned the payment.

Although Orkin has made exceptions to the increase of annual renewal fees for some of its customers, the ex-

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10. Private legal action "may be too expensive to be practicable for individual consumers to pursue." *See* "Unfairness Statement," p. 7 n. 19.

ceptions have not ameliorated the injury to the vast majority of the affected customers. As a general matter, Orkin did not inform its customers that any exceptions to the increase would be made. The notice Orkin sent to customers informing the customers [71] of the fee increase made no mention of exceptions. (F. 47) Mr. Raymond's memorandum of August 13, 1980, to branch offices instructed that if a customer complained that Orkin did not have the right to raise the annual fee, Orkin personnel were to attempt to justify the increase by explaining Orkin's interpretation of the contracts. (F. 57) A form letter sent by Orkin to numerous customers who complained about the fee increase stated that the increase was consistent with law and reasonable business standards; it made no mention of making exceptions to the increase. The form letter requested submission of the increased fee to keep the customer's coverage in effect. Customers had to rely on their own persistence to obtain information that exceptions could be made to this price increase. (F. 56)

The exceptions that Orkin would make to the increase of the annual renewal fees changed over time. (F. 58) In his memorandum of August 13, 1980, Mr. Raymond advised branch offices that the only exception to the increase of annual fees would be for customers who could *prove* they had the pamphlet concerning "Orkin 12" by reading point 6 of that pamphlet. If a customer did that, the customer was to be told that a computer *mistake* had been made and that a corrected bill would be sent. (F. 57)

Four months later, in his memorandum of December 11, 1980, Mr. Raymond wrote to branch managers that further exceptions could be made to the increase of annual fees. (F. 58) The procedures for handling price increase exceptions attached to Mr. Raymond's December memo-

randum instructed branch personnel to attempt to justify the increase if a customer complained. (F. 59) If such justification were not accepted and the customer remained unsatisfied, the customer was to be told the annual fee stated in the customer's contract would be restored if the customer would state *in writing* that at the time of entering into the contract the customer believed the fee would not increase. Whether the customer contacted Orkin by phone or letter, a form letter was to be sent to unsatisfied customers reiterating what the customer must place in writing. (F. 59) This form letter also contained assertions that Orkin had a legal right to raise the annual fee. (F. 59 at "Letter #1") If a customer made this representation to Orkin in writing, Orkin would review the request for restoration of the original fee. Branch managers were instructed that "while we intend to be flexible in our evaluations you should be alert to any abuses, particularly when complaints from customers exceed 1% of the affacted customer base." (F. 58)

Orkin eventually rolled back the annual fee of customers who entered into their termite contracts in 1968, the year Orkin 12 had been promoted. (F. 62) One year after Orkin raised the annual renewal fees, customers with contracts dated 1968 were notified of the rollback by an insert in their renewal notices that were sent from August, 1981, through July, 1982. The insert attributed the rollback to a marketing program Orkin had learned [72] about subsequent to the original increase of the annual fees. (F. 62) The marketing program referred to was Orkin 12. This representation was false. Gary Rollins, President of Orkin, had full knowledge of the "Orkin 12" promotion when he made the decision to increase the fees. (F. 45) The decision to roll back the annual fees for 1968 customers

was the only exception to the increase that did not place the burden to act on customers.

In the memorandum written by Gary Rollins, then President of Orkin, to R. Randall Rollins, then President of Rollins, Inc., Gary Rollins listed as one option in respect to the proposed increase in annual renewal fees to "write customers and put on voluntary basis." Another option was to "raise and handle exceptions." It was this latter option that Orkin chose. Customers were given the option of paying the higher fee or losing protection. Only the persistent customers were accommodated. Thus, Orkin's "accommodation" programs were not viable means by which customers could have avoided injury.

Orkin contends, however, that the guarantee at an alleged fixed renewal fee was really "icing on the cake"; that consumers really did not rely upon this contract provision at the time the contracts were executed. (Resp. Brief, pp. 50-52; Resp. Reply, p. 14) According to Orkin this lack of reliance on the guarantee at a fixed annual renewal fee is shown "by the remarkably low percentage of Orkin's pre-1975 customers who objected to or refused to go along with the 1980 increase." Orkin states that "at a minimum" the evidence creates a "genuine question of material fact" as to the extent Orkin's pre-1975 customers bargained for an assurance from Orkin that the initially stated annual renewal fee was fixed. (Resp. Brief, p. 53)

Orkin contends that most customers first became interested in termite protection after discovering that they had a termite problem; that most customers were concerned principally with getting prompt termite treatment and not with a long-term guarantee; that Orkin was contacted because of its reputation; that customers did little

"comparison shopping" before electing to contract with Orkin; and that "a good number" of customers contracted with Orkin irrespective of the "lifetime" guarantee, the initially stated annual renewal premium, or whether Orkin [73] could, or would, ever raise the annual renewal premium.[11] (Resp. Brief, pp. 51-52)

Orkin contends, in effect, that the fixed annual renewal rate was of secondary or little importance to consumers.[12] Assuming that Orkin's contentions are true, they are of peripheral significance in this case. Many sales or "deals" are made possible by the "icing on the cake" that is offered as part of a deal. It is this something extra that convinces the consumer to make the contract. After making a contract, consumers are entitled to receive everything contracted for, whether it was the primary inducement or secondary inducement in the agreement. Any determination to permit only partial compliance with a contract, or to require performance of only the primary benefits of the contracts, would make a mockery of contract law and consumer protection. Further, the evidence which Orkin cites as

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11. Respondent Orkin also contends that "a not insubstantial number" of customers holding pre-1975 contracts were or are not the original homeowners who actually contracted with Orkin, and it is unlikely these purchasers relied on the "lifetime" guarantee or the initially stated annual renewal rate. The new homeowner steps into the shoes of the original contracting party, pursuant to a feature *advertised* and *promoted* by Orkin (*see* the Orkin 12 pamphlet—F. 28, the February, 1973, promotional literature—F. 33, and the "Termite Sales Training Lessons 1-6" - F. 35), and is entitled to the same protection as the contracting homeowner. The termite protection offered by Orkin's guarantee must have had some significance to the new homeowners, if payments under the guarantee were continued.

12. The Commission assumes that all expressed claims are material, and that implied claims are material if they pertain to costs. *International Harvester Co.*, 3 Trade Reg. Rep. (CCH) ¶ 22,217 at 23,178.

support for the proposition that the fixed annual fee was not of significance to consumers does not support this claim. (*See* Resp. F. 94-95) Witnesses Trahant, Hoffman, Thompson and Terrebonne, cited by Orkin, testified that the fixed annual renewal fee was of significance to them.

The fact that as of August 1, 1984, 164,402 pre-1975 customers were paying the annual renewal fee and over 142,000 of those customers paying the *increased* annual renewal fee, is strong evidence that Orkin's customers value the protection being [74] offered by Orkin's lifetime guarantee.[13] (F. 66-67) Further, in 1968, Orkin spent $1,157,000 advertising the Orkin 12 program which promoted the lifetime protection concept at a fixed annual renewal fee. This is also strong evidence that Orkin believed the lifetime protection plan was of significance to consumers. (F. 27) As of 1980, Orkin had 647,128 termite renewal accounts. (RX 650Z28) According to Orkin, its major competitors offer lifetime guarantees on their termite control services contracts. (Resp. F. 15-19) The fact that Orkin and its competitors offer lifetime guarantees is a strong indication that this service is of importance to consumers. (Nolen AFF. ¶ 6) Normal attrition in Orkin's annual renewal contracts is only 5.8% overall, and only 5.2% on contracts in effect over five years (F. 66), another indication of the significance to consumers of the continued guarantee. At the

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13. In the letter sent to pre-1975 customers notifying customers of the increase in the annual renewal fees, Orkin stated:

> Thank you for being an Orkin customer and allowing us to protect your home against wood infesting organisms. We're sure you agree this protection is as important as homeowner and fire insurance, but it is much less expensive.

(F. 47)

time of the increase in 1980 of the annual renewal fee, the affected customers had been paying annual renewal fees for from five to fifteen years. Since consumers continue to pay the annual renewal fees to maintain their termite protection, it is concluded that customers place a definite value on the lifetime protection guarantee.

Orkin also argues that the pre-1975 customers could receive "substantially" the same protection that they received from Orkin from any of Orkin's competitors who also offer a "lifetime" guarantee, and that such competitors would have assumed Orkin's pre-1975 contracts at their initially stated annual fee, "or for fees less than those charged by Orkin after the 1980 increase." (Resp. Reply, p. 15; Resp. F. 72) The evidence cited by Orkin does not support this contention. Witnesses Murphy, Hromada and Tindol state that they have, on occasion, picked up the contracts of competitors at the fixed contract rate. From this general testimony it cannot be concluded that these competitors would pick up some, or *all*, of Orkin's pre-1975 contracts at the contract rate fixed prior to 1975. Gary Rollins, President of Orkin, testified that he would doubt that competitors would accept the Orkin contracts at the pre-1975 rates. (F. 71)

One of the basic arguments advanced by Orkin in this proceeding is that the inflation in costs has caused Orkin to sustain a loss on the pre-1975 accounts even with the increase in [75] fees that was made in 1980. Orkin's loss would be much greater if the rates were rolled back to the initial fixed rate. (F. 72) It would be illogical, indeed, to conclude that competitors would service Orkin's pre-1975 customers at the initial fixed annual renewal fee and inevitably sustain a loss on the

contracts. Thus, consumers could not avoid injury by switching to Orkin's competitors.

There is an adequate record on which to determine that the fixed annual renewal fee was of value to consumers and was of significance to consumers in entering into contracts with Orkin. Therefore, no evidentiary hearing is necessary on these issues. It also is concluded that customers suffered substantial injury when Orkin in 1980 raised the fixed annual renewal fees on pre-1975 contracts, and that the pre-1975 customers could not reasonably have avoided this injury.

4) There Were No Countervailing Benefits to Consumers or Competition

Orkin's pre-1975 customers have not benefited from Orkin's raising of the annual renewal fees that they must pay to continue their guarantees. All that customers have received from the increase in annual renewal fees is the additional burden of paying more for Orkin's services than they had originally agreed upon. Orkin's guidelines and standards for quality of services rendered under its termite guarantees did not differ either before or after the annual renewal fee increase depending on whether or not the customer's termite contract was a pre-1975 contract; nor did Orkin ever consider lowering the quality of service to pre-1975 customers. (F. 70) Furthermore, customers were not in danger of losing their protection under the guarantee as a result of Orkin going into bankruptcy. Orkin is and has been a profitable concern at all times with a substantial net worth. (F. 6) Thus, the increase in annual renewal fees did not offer any countervailing benefits to pre-1975 customers.

Orkin's raising of the annual renewal fees has not provided any countervailing benefits to competition. Information as to the availability, nature and prices of products and services plays an indispensable role in the allocation of resources in a free enterprise system. *See Bates v. State Bar of Arizona,* 433 U.S. 350, 364 (1972). Based on information available to them, consumers make their purchase decisions once they find an acceptable price and quality mix among the relative offerings of competing sellers. "One effect of healthy competition is to redirect production and sales from less efficient firms to more efficient rivals." *International Telephone & Telegraph Corporation,* 3 Trade Reg. Rep. (CCH) ¶ 22,188 at 23,082 (July 25, 1984). Assuming an economic model of a competitive market, consumers will choose the seller who offers the lowest price for a given level of quality. Assuming a normal competitive return, the seller with the lowest price has the lowest costs per unit and is the most efficient. In this [76] fashion, the market rewards the efficient seller to the ultimate benefit of consumers.

Orkin's action reduces the reliability of the price information that consumers have in making their purchase decisions. If, in a previously undisclosed manner, a seller is allowed after the transaction is consummated, to raise the total price of services rendered, consumers will be unable in the first instance to determine the seller offering the lowest total price for a given quality of service. Inefficient sellers would be able to mask their inefficiency until after the sale was made and at a later time reveal the higher price. The competitive process of rewarding efficient competitors would be impaired if a seller is allowed to except itself from the competitive process by unilaterally changing the bargains it has made.

Contracts are used in our society to promote value exchanges. They do so by defining the terms of exchanges parties have agreed upon and by providing increased certainty that the exchanges will occur as agreed. A basic tenet of contract law is to preserve mutually agreed-upon bargains that have been freely recorded in contract terms. Courts will not remake contracts for the benefit of one party and the detriment of another; nor will courts allow a unilateral modification of a contract. These policies of the law seek to avoid the loss to a party of the basis of his bargain. By refusing to perform as promised, Orkin threatens the integrity of contracts and their vital role in value exchanges. Competition will suffer if the integrity of contracts can be abrogated at the instance of one party to the contract. Marketplace confidence will be lost and competition will suffer.

Orkin raises several defenses to this issue of countervailing benefits to consumers and competition. Orkin argues that any order compeling Orkin to roll back the annual renewal fees on its pre-1975 contracts, and forbidding it from raising these fees for the lifetime of the agreements, would have severe adverse repercussions on its entire customer base, and on many of its smaller competitors, that would more than offset any cost savings that may be enjoyed by Orkin's pre-1975 customers.

If pre-1975 customer annual renewal rates are frozen at the pre-1975 rates, post-1975 customers will be left to carry the full burden of escalating costs of servicing all Orkin customers. One group of customers would be subsidizing another, which, according to Orkin, would be unfair and at odds with what should be the policy underlying Section 5 enforcement. (Resp. Brief, pp. 55-56) Orkin

contends its competitors would also suffer if its pre-1975 contracts were deemed not to permit any increase in their initially stated annual renewal premiums. A number of other termite control companies collectively have outstanding numerous similar contracts and most, if not all, of these competitors have raised the annual renewal rates on their contracts. Any ruling in this proceeding that jeopardized these [77] past increases by these competitors, or any future raises, could endanger the survival of certain of these smaller operators which make up the bulk of the industry. In addition, it would be difficult, if not impossible, for competitors of Orkin successfully to solicit any pest control business from any of Orkin's more than 142,000 remaining pre-1975 customers so long as Orkin is foreclosed from increasing the annual renewal fees. These customers will essentially be "locked" into Orkin and removed from the normal interplay of unrestricted market forces.

Upholding Orkin's right to raise the annual renewal premiums on its pre-1975 contracts would be accompanied by substantial economic and equitable advantages to both the majority of its termite control services customers and many of its competitors. Orkin submits that these purported gains outbalance any injury that allegedly would be sustained by its pre-1975 customers if they are required to pay a more fair proportion of the actual costs of honoring their pre-1975 guarantees.

Assuming that Orkin will increase the annual renewal fees of post-1975 customers above what it would normally do, to recoup in part the loss of revenue from the inability to increase pre-1975 annual renewal rates, this may not have the anticompetitive consequences which Orkin foresees. If the industry is as fragmented and competitive as

Orkin contends (Resp. F. 85), Orkin may not be able to increase post-1975 annual renewal fees to the extent desired due to competitive pressures. Orkin may have to become more efficient to overcome the shortfall in revenues, or suffer a decline in profits. This could enhance competition in the industry. Under this competitive scenario post-1975 customers would not be subsidizing pre-1975 customers. To the extent there is some subsidization, economics provides no efficiency judgment on the transfer of wealth between various individuals. However, competition will be enhanced generally if sellers are required to perform according to their contracts and consumers are able to rely upon the integrity of the marketplace. To permit unilateral modification or breach of contract by sellers would be disastrous to consumers and to competition generally.

The effect on competitors of a ruling in this proceeding requiring Orkin to roll back its price increase on pre-1975 contracts and prohibiting any future fee increase is grossly overstated by Orkin. If competitors have contracts similar to the Orkin pre-1975 contracts, and have increased renewal fees which they may have to roll back, consumers and competition will benefit. If some competitors have to go out of business as a result, which is highly unlikely, others can enter and grow and fill the void, since entry into the termite control business is easy, requiring little capital and expertise. (F. 5) If all termite control companies honor their guarantees, the industry will be operating on a higher ethical level, from which consumers and competition will benefit. [78]

The effect on Orkin's competitors of a price freeze on Orkin's pre-1975 customers will be minimal, if there is any

discernable effect at all. Orkin states that all competitors now offer lifetime guarantees. Customers who receive a lifetime guarantee from one company will be unlikely to switch to another company. Thus, within the industry these guarantees tend to freeze customers with the company that performs the initial treatment to the premises. Further, Orkin's pre-1975 customers have been tied to Orkin; some as long as eighteen years (1966-1984). Being tied to Orkin for a longer period will have little or no additional effect on competitors. The market for termite control services is immense. Growth of new construction creates a growing market, especially in the South and Southwest, where such services are in demand. (F. 2) The small segment of the market represented by Orkin's pre-1975 customers, which declines normally each year, represents no threat to competitors. In a pretrial ruling in this proceeding which rejected Orkin's assertion of injury to competition, it was stated:

> There is little likelihood that the number of customers receiving, or eligible to receive, respondent's asserted "below cost prices" will enable respondent to acquire a monopoly in any relevant market, nor does it appear that such prices will create a dangerous probability of monopolization.

(Order Denying Respondent's Motion For Reconsideration Of Its Motion For An Order Requiring Access To Documents Pertaining To Costs, p. 2, October 2, 1984)

It appears that there are no countervailing benefits to consumers or to competition that outweigh the injury to consumers caused by Orkin's increase in the annual renewal fees on pre-1975 contracts.

D. *Orkin's Other Defenses*

(1) Good Faith Reliance on Legal Opinions

During December, 1978, Orkin received a legal opinion from Arnall, Golden & Gregory, regarding the permissibility of increasing the annual renewal fees of pre-1975 customers. The law firm concluded that Orkin's pre-1975 contracts were of indefinite duration and terminable after a reasonable time. James M. Schneider, General Counsel of Rollins, Inc., reviewed the legal opinion received from Arnall, Golden & Gregory, and confirmed to management the conclusions reached in the opinion. (Resp. F. 39) Orkin contends that Gary Rollins relied upon these opinions [79] in his decision to increase the annual renewal fees of pre-1975 customers.[14] (Resp. F. 38, 41)

There is reason to doubt Orkin's claim of good faith reliance on these legal opinions. The issue considered by the law firm was "are there any grounds for the claim that a contract which may be renewed or extended from year to year, indefinitely, is unenforceable?" The firm also assumed that the Orkin contract involved "a right *to extend the term of the original contract* and here the issue would be two-fold: (1) possible failure as a perpetual contract and (2) possible failure for indefiniteness of terms." (emphasis in original) The issue considered by the law firm and the assumptions by the

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14. Orkin also references a legal opinion it received from a Florida law firm in 1981, after the price increase decision had been made and implemented, as a good faith basis for continuing in effect the price increase. (Resp. F. 47-48) Since this legal opinion was received *after* the price increase had been implemented, it could not have contributed in any way to the earlier decision to increase the annual renewal fees.

firm do not meet the issue presented within the four corners of the Orkin contracts—does a contract that guarantees lifetime protection to a designated property upon payment of a stated annual renewal fee have a determinable duration? Further, it is established that at the time Mr. Schneider reviewed and confirmed the legal opinion rendered by the law firm, Mr. Schneider was not aware of the Orkin 12 promotion. Since Mr. Schneider was not aware of the Orkin 12 promotion and was the person who communicated with the firm, it is questionable whether the law firm was aware of the promotion. (*See* F. 41) The Orkin 12 promotion stated:

> LIFETIME GUARANTEE. Orkin's lifetime termite protection plan includes annual reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection *is very modest and never increases.* In case of a sale, the guarantee is transferable.

(F. 28) (emphasis in original)

The Orkin 12 promotion, quoted above, is a clear statement by Orkin that the Lifetime Guarantee protects the property against termite reinfestation *for the life of the structure.* Had the law firm of Arnall, Golden & Gregory, and Mr. Schneider, had this information before them at the time of rendering legal advice, it is probable that they would not have assumed the contract to be perpetual or indefinite in duration. [80]

Gary Rollins, when he wrote his synopsis to R. Randall Rollins concerning the proposal to increase the

annual renewal fees on pre-1975 contracts, did not mention any legal opinion as a basis for his decision to increase the annual renewal fees. Gary Rollins' synopsis indicates that he expected there could be problems with state regulatory agencies and customer lawsuits. (F. 43) Had the legal opinions of counsel played a significant role in his decision to increase the annual renewal fees, it seems likely he would have mentioned this fact in his recommendation.

The Commission's complaint has charged Orkin with raising the fixed annual renewal fees on its customer contracts in contradiction of its agreements with customers to maintain the fixed annual renewal fees for the life of the structure. Orkin's subjective state of mind or intent at the time it increased the annual renewal fees is immaterial to the violation of law charged in the Commission's complaint. Further, it is settled law that a party cannot be absolved from liability because it relied on the advice of counsel. As the court stated in *Gregg v. Chauffeurs, Teamsters and Helpers Union Local 150*, 699 F.2d 1015, 1017 (9th Cir. 1983):

> Such a rule would virtually eliminate a remedy for arbitrary, discriminatory, or bad faith union action, as long as an attorney recommended such action. We are not persuaded that reliance on an attorney's advice should insulate the union from liability for its breach of its duty to represent its members fairly.

(2) Costs

Orkin has raised the specter of its increased costs in servicing pre-1975 contracts at the fixed annual renewal fee stated in its contracts, and the loss Orkin will suffer

if prohibited from increasing the annual renewal fees. (Resp. F. 82-83) "As a general principle, difficulty or even improbability of accomplishment without financial loss will not release a party from his contract." 17 Am. Jur. 2d, Contracts, Section 402. Further, Orkin's financial condition does not appear to be imperiled by any financial loss it may sustain in fulfilling its contractual obligations to its pre-1975 customers. (F. 6)

(3) Public Policy Considerations

Orkin maintains that public policy recognizes the fairness and legitimacy of Orkin's increase in the annual renewal fees on its pre-1975 contracts. Orkin states that any finding that Orkin's conduct constitutes an "unfair act or practice" would squarely contradict the statutory and common law of each of the states in which Orkin entered into these agreements. Further, Orkin stresses that thirteen states "have declined to take any action against Orkin" after carefully reviewing Orkin's "accommodation" programs which have excepted certain customers [81] from the price increase. Six of these states, according to Orkin, have acknowledged that the accommodation program is a reasonable response to Orkin's need for additional revenue to cover continually escalating costs of its termite operations. (Resp. Brief, pp. 59-60)

A basic tenet of contract law is that private agreements should be enforced according to their terms. Courts will not make a better contract for the parties than that which they have seen fit to enter into, nor will courts alter a contract for the benefit of one party and to the detriment of another. *Williams Petroleum Co. v. Midland Cooperatives, Inc.*, 539 F.2d 694, 696 (10th Cir. 1976). Orkin claims that

at the time it entered into the pre-1975 contracts no one anticipated that inflationary pressures would be a major problem. (Resp. Brief, p. 38) Prior to 1966, Orkin limited the duration of its guarantees to five to fifteen years. In 1966, Orkin commenced a marketing program offering lifetime guarantees at a fixed annual renewal fee. Thus, Orkin accepted the risk of costs increasing over time, the possibility of which was certainly known to Orkin. Customers were placed under duress by Orkin when the price increase was announced; the customers had no choice but to pay the increase or lose the protection. The bargaining power of the parties was weighted heavily in favor of Orkin. Orkin has cited no statutory or public policy statement that would support such a unilateral breach of a contract.

Orkin's claims that inaction by thirteen states after reviewing Orkin's accommodation program, and approval by six states of Orkin's accommodation program, amounts to an expression of public policy approving Orkin's acts and practices. This is an overstatement of the significance of this state action. Each of these states challenged Orkin's right to increase the annual renewal fees on pre-1975 contracts, and each state accepted Orkin's pledge to roll back the price increase on every customer who complained and insisted that Orkin had represented that the annual renewal fee would remain fixed. The record is not clear as to the care with which the various states reviewed the facts of customer complaints. Certainly there is no indication that the states have reviewed a record such as is presented in this Commission proceeding; nor is there any substantial evidence of why the states chose not to take any further action after being presented with Orkin's ac-

commodation program.[15] The North Carolina Attorney General's office stated: "That we have made this enforcement decision in no way changes our view that Orkin is probably required to live by the letter of those contracts." (CX 222) The Maryland Attorney General's office has indicated [82] that the State of Maryland is awaiting the Commission's action in this proceeding.[16] (CX 410)

The actions of the states in accepting Orkin's accommodation program in settlement of consumer complaints indicate at most an exercise of prosecutorial discretion. These actions by the states do not express a public policy that is "declared or embodied in formal sources such as statutes, judicial decisions, or the constitution as interpreted by the courts. . . ." *Unfairness Statement* at 12. State action does not foreclose the Commission from taking such further action as the public interest may require. *See FTC v. Sperry & Hutchison Co.*, 405 U.S. 233, 239 n. 4.

III. RELIEF

It is well established that "the Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices" and that, so long as the remedy selected has a "reasonable relation to the unlawful practices found to exist" the courts will not interfere. *Jacob Seigel Co. v. FTC*, 327 U.S. 608, 611 (1946); *see also*, *FTC v. Cement Institute*, 333 U.S. 683, 726 (1948); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374,

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15. Orkin's accommodation program amounts to nothing more than Gary Rollin's recommendation at the time Orkin increased the annual renewal fees on pre-1975 contracts—"[R]aise and handle exceptions." (F. 43)

16. The states of Florida and Louisiana have instituted court action against Orkin. (*See* fn. 9, *supra*)

392 (1965); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 23 (7th Cir. 1971).

The relief proposed in the complaint includes provisions that would prohibit Orkin from collecting or receiving from any consumer any annual renewal fee for termite protection which is greater than the fixed annual renewal fee specified in the consumer's contract, unless the contract clearly discloses that the fee may be increased. Orkin would be prohibited from terminating or modifying any agreement with a consumer by any means inconsistent with the contract terms. Orkin also would be required to notify each consumer with whom Orkin has an agreement containing a fixed annual renewal fee that Orkin is prohibited from collecting or receiving any annual renewal fee which is greater than the fixed annual fee specified in the agreement. The proposed relief also states that, if the facts are found as alleged in the complaint, the Commission may seek relief to redress injury to consumers under Section 19 of the FTC Act. Section 19 relief is not before the administrative law judge in this action and will not be considered further. *See Electronic Computer Programming Institute, Inc.*, Dkt. 8952, 86 F.T.C. 1093, 1097 (Interlocutory Order, Nov. 11, 1975). [83]

Complaint counsel has requested an order along the lines of the relief proposed in the complaint. In addition, complaint counsel would require Orkin to mail to each pre-1975 customer (or his successor in interest) a notice in the form of a letter which would inform each customer that the Commission has ordered Orkin to roll back the annual renewal fee on the customer's contract. This notice would advise those customers whose contracts have

lapsed since Orkin increased the annual renewal fee in 1980, that Orkin will honor the terms of the customer's guarantee at the fixed annual renewal fee in the pre-1975 contracts. Complaint counsel is not seeking restitution or refund of any increased payments that have been made by pre-1975 customers.

Orkin objects to complaint counsel's proposed letter to all pre-1975 customers as unnecessarily and improperly disparaging of Orkin. Orkin also objects to the broad category of customers complaint counsel's proposed order would require Orkin to notify about the roll back in annual renewal fees. Orkin maintains that it is unnecessary and not a remedy of any alleged unfair act or practice to send notices to the approximately 21,500 customers who have had their annual renewal fees rolled back and frozen at the renewal fee initially stated in their contracts. Orkin also states that first class postage to this group of customers would impose unreasonable and unduly burdensome costs upon Orkin with no countervailing benefit to consumers. Such a notice also would be confusing to their customers, according to Orkin.

Orkin foresees legal and practical difficulties in complaint counsel's proposed requirement that Orkin notify and, in effect, reinstate those former pre-1975 customers who have chosen not to continue their Orkin contracts since the announcement of the 1980 increase. This requirement is reasonably related to the remedy sought by complaint counsel only if those customers stopped paying their annual renewal fees because of the 1980 increase of their premiums. Cancellations by pre-1975 customers has not exceeded to any appreciable degree Orkin's usual cancellation rate. (F. 66)

Orkin points out that there are many reasons why these former pre-1975 customers may have failed to renew their contracts. For instance, they may have obtained similar services elsewhere at a lower rate; they may no longer have felt the need for termite service because the problem which caused them to call Orkin initially had been rectified; or, they may have sold the covered residence to subsequent owners who chose not to continue the coverage. To comply with the proposed order, Orkin would have to send notices to the record addresses of all those pre-1975 customers who received notice of the increase in 1980. Many of these notices would go to the new owners of residences, once covered by pre-1975 contracts, who have never been Orkin customers. This would cause great confusion and numerous administrative difficulties. Orkin states that the requirement that Orkin reinstate the guarantees of those pre-1975 customers [84] who have not renewed their contracts, exposes Orkin to either unwarranted risk or expense. Unless these former customers have, in the interim, contracted with another termite service, their homes have gone uninspected and untreated for up to five years. Orkin should not be deemed to have guaranteed these structures against damage which may have occurred during the period when Orkin did not service the premises. In addition, even if these former customers have received, in the interim, termite control services from another company, Orkin should not be required to guarantee the work of the other companies. To eliminate the risk inherent in reinstating cancelled guarantees. Orkin would have to undertake, at great expense, the retreatment of each of these structures.

Finally, Orkin argues that complaint counsel's proposed order denied Orkin and its pre-1975 customers the right to modify their contractual relationship by mutual agreement. This is contrary to well-established principles of contract law (*see, e.g., Restatement (Second)* Sections 273, 279 and 280), and serves no remedial purpose. Any remedial order entered in this proceeding should expressly provide that Orkin may, in the required notice or at any other time, offer its pre-1975 customers the opportunity to substitute, for additional consideration, Orkin's current contracts for their pre-1975 contracts, or seek any other modification or novation permitted under recognized principles of contract law.

Orkin has also submitted an alternative proposed notice to be sent to its current, unfrozen pre-1975 customers, which Orkin submits avoids some of the difficulties inherent in complaint counsel's proposed notice.

The arguments presented by Orkin in respect to the 21,500 customers who have had their annual renewal fees rolled back and frozen at the initial contract level are persuasive. Since these customers already have received all the relief complaint counsel proposes, it is unnecessary to notify them of the Commission's action in this matter. It also has the possibility of causing some confusion to these customers. Finally, it would be burdensome and expensive to Orkin to perform what is essentially an unnecessary act. The order to be entered herewith will exclude these customers from the notice being required by the order to be sent to pre-1975 customers. The other remedial provisions of the order will assure that Orkin does not increase the annual renewal fees of these customers, except as provided in the order.

Orkin's argument in respect to the pre-1975 customers who failed to keep their guarantees in effect spells out the difficulties which will be encountered in any reinstatement of the guarantees of those customers. First, it is not known why these customers failed to renew their guarantees, and it would be impractical to attempt to ascertain the reasons the customers did not renew their guarantees. Some customers may have renewed [85] their contracts in 1980, but failed to continue the guarantee in later years. Only if the failure to renew was due to the increased annual renewal fee would these customers be entitled to relief. As Orkin points out, the cancellation rate of pre-1975 customers after the 1980 increase in the annual renewal fees did not exceed the usual rate of cancellation of all customers.

The more serious problem raised by Orkin concerns the fact that Orkin would be required to reinspect and possibly retreat the premises of customers who allowed their guarantees to lapse, and Orkin would be liable for any reinfestation or damage which may have occurred during the period since 1980. Further, some customers who were really interested in continuous protection against termite infestation and objected to Orkin's price increase may have contracted with other termite control companies since 1980. This could cause some problems between Orkin and its competitors, if Orkin offers to reinstate its guarantees to such customers. Also, this could cause confusion to the customers.

In sum, it appears that requiring reinstatement of all pre-1975 customers who did not renew their guarantees, or who renewed their guarantees in 1980, but later determined to drop the protection, would cause many problems and much confusion to the extent that such relief is not warranted.

Some of the criticisms which Orkin has leveled at complaint counsel's proposed notice are well taken. Orkin's proposed notice is unacceptable in its entirety. An appropriate notice has been ordered. The notice will be sent only to those pre-1975 customers who are still renewing their termite protection at the increased annual renewal fee. The requirement that this notice be sent to those 21,500 customers who have had their annual fee rolled back is unnecessary, would require additional costs to Orkin, and could be confusing to those customers.

Under terms of the order entered herewith, Orkin is prohibited from charging or receiving from *any* pre-1975 customer any annual fee that is greater than that specified in the pre-1975 contracts or pre-1975 guarantees. This provision would include those pre-1975 customers whose annual renewal fees have already been rolled back. Orkin is also prohibited from refusing to accept payment of the annual renewal fee stated in the pre-1975 contracts or pre-1975 guarantees, and from refusing to perform the obligations specified in such contracts and guarantees when the annual renewal fee is tendered.

Orkin is also prohibited from requesting, charging, collecting or receiving from *any* customer any annual renewal fee that is greater than the annual fee stated in the customer's contract or guarantee, unless the contract specifically provides that Orkin may increase the annual renewal fee. Orkin is prohibited from modifying or changing any customer's contract or guarantee by any means not specified in the contract or [86] guarantee. These are fencing-in provisions which are necessary to insure in the future that Orkin does not unilaterally and in contradiction of its contracts, modify or change its customer

contracts. As has been shown by this record, most customers were at the mercy of Orkin when their contracts were changed. They had no choice but to agree to the modification, or lose protection. These fencing-in provisions will assure that Orkin will not repeat in the future the violation which occurred in the past. Additionally, Orkin will not be unduly burdened by these provisions since contracts easily can be drafted which will set forth the procedures for contract modification or change.

A proviso has been included in the order which will permit Orkin to seek a modification or novation of its pre-1975 contracts. It seems reasonable to permit Orkin to contact these customers and seek approval of customers for a contract change. This provision will require customers approval for any contract change, and is in stark contrast to Orkin's past action in unilaterally modifying its customer contracts. Two safeguards have been written into this proviso. First, no attempt at contract modification can be made until customers have made two annual renewal fee payments at the rate specified in the pre-1975 contracts. This is to prevent any confusion which might arise if Orkin sends out the notice letter that fees are being rolled back and at the same time asks for contract modification. The two year period will enable the customer to comprehend the value of the reduced annual renewal fee, and to consider any request for contract modification separate and apart from the fee roll back. The additional safeguard requires Orkin to obtain approval from the Commission of any materials or communications with these customers in respect to any request for contract modification. This provision will assure that all communications will be clear and understandable, and that no customer will be pressured or misled in any material respect.

IV. CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over respondent and the subject matter of this proceeding.

2. At all times relevant herein, respondent has maintained a substantial course of business, including the acts and practices as hereinafter set forth, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. In contradiction of the agreements it had entered into with its pre-1975 customers, from 1980 to the present respondent has raised or attempted to raise the amount of the annual renewal fees stated in the agreements, thereby causing substantial and ongoing injury to such customers. [87]

4. The substantial and ongoing injury to respondent's customers is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers.

5. Respondent's acts and practices as described in Paragraph 3, above, constitute unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45(a)).

6. The order entered hereafter is necessary and appropriate to remedy the aforesaid violations of law.

ORDER

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. *Customer* shall mean any consumer or business owning or holding a termite control services contract or guarantee entered into or issued by respondent.

B. *Pre-1975 contract* shall mean any contract entered into by respondent for the purpose of supplying services to control termites, wood-infesting organisms, moisture, or wood decay to its customers that includes the term "lifetime" and does not mention adjustments to or increases of the annual fee (which annual fee must be paid to continue the lifetime [88] guarantee issued with respect to such contract), except and unless the treated premises are structurally modified, altered or otherwise changed after the date of initial treatment.

C. *Pre-1975 guarantee* shall mean any guarantee extended by respondent to a customer in connection with the execution of a pre-1975 contract.

D. *Pre-1975 customer* shall mean any customer owning or holding a pre-1975 contract and/or pre-1975 guarantee to whom Orkin sent a notice of the increase in annual fee and who has submitted an annual fee each year since such increase of annual fees occurred.

II.

It is ordered That respondent, Orkin Exterminating Company, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any product or service to [89] protect a house, building or other structure from termites, wood-infesting

organisms, moisture, or wood decay, shall forthwith cease and desist from:

A. Requesting, charging, collecting or receiving from any pre-1975 customer (or his successor in interest) any annual fee that is greater than that specified in the pre-1975 contract or pre-1975 guarantee of that customer.

B. Refusing to accept from any pre-1975 customer (or his successor in interest) the amount of the annual fee stated in the pre-1975 contract or pre-1975 guarantee of such customer.

C. Refusing to perform the obligations specified in the pre-1975 guarantee of any pre-1975 customer (or his successor in interest) who tenders payment of the annual fee stated in that customer's pre-1975 contract or pre-1975 guarantee within two months of the anniversary month of the initial treatment by Orkin, and/or refusing to perform such guarantee obligations in any succeeding year in which a pre-1975 customer (or his successor in interest) tenders payment of the annual fee specified in his pre-1975 contract or pre-1975 [90] guarantee within two months of the anniversary month of the initial treatment by respondent.

D. Requesting, charging, collecting or receiving from any customer owning or holding a contract or guarantee any annual fee that is greater than the annual fee specified in the contract or guarantee of the customer, unless said contract or guarantee clearly and conspicuously discloses that such annual fee may be raised at respondent's option.

E. Modifying, changing or altering, or attempting to modify, change or alter, any contract and/or guarantee by any procedure, method or means not clearly and

conspicuously disclosed in any such contract or guarantee.

Provided, however, That nothing contained in this order shall prevent respondent from seeking a modification or novation of its pre-1975 contracts and pre-1975 guarantees with its pre-1975 customers which would permit, *inter alia,* a change in the annual fee to be paid or the services to be rendered, *provided further,* that no such attempt to seek modification or novation shall be made until each such customer has received a notice of this order, as provided in Part III hereof, and has made at least two annual fee payments at the annual fee specified in the pre- [91] 1975 contract and/or guarantee, and *provided further,* that respondent shall obtain approval of the Federal Trade Commission for each and every document or representation which respondent may use or make in any attempt to seek a modification or novation of its pre-1975 contracts and/or pre-1975 guarantees as provided herein.

III.

It is further ordered, That respondent shall send each pre-1975 customer (or his successor in interest) by first class United States mail the following notice no later than two months prior to the anniversary date of the initial treatment rendered to such customer:

Dear Customer:

This letter contains important information about a decrease of your annual fee. Please read it.

Beginning in 1980, Orkin increased the annual fee for certain of its customers whose lifetime guarantees did not give Orkin the right to raise the an-

nual fee. You were one of the affected customers. The Federal Trade Commission has ordered Orkin to roll back your annual fee to the amount stated in your contract or guarantee. Under the [92] terms of the Federal Trade Commission order you will continue to receive the lifetime protection that Orkin has guaranteed as long as you pay the annual fee each year.

There is one exception to this order. If you have structurally modified the treated structure, Orkin may terminate the guarantee or increase the fee under the terms of your original agreement. Absent such a structural modification, Orkin is prohibited from increasing your annual renewal fee without your consent.

If you desire to continue your guaranteed protection, please submit your annual fee along with the enclosed invoice. We suggest you check the amount of the annual fee stated in your contract or guarantee with that of the enclosed invoice. If there is any discrepancy or you have any other questions, please call your local branch.

Sincerely yours,
President of Orkin [93]

Each envelope containing the foregoing notice shall bear the following legend in red 14 point print on its face: IMPORTANT NOTICE OF ANNUAL FEE REDUCTION ENCLOSED.

IV.

It is further ordered, That respondent distribute a copy of this order to all of its current officers, directors,

district managers and branch managers, and to future personnel in those positions for the next two years, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this order.

VI.

It is further ordered, That respondent shall for three years file with the Commission every one hundred eighty (180) [94] days after service upon it of this order a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

It is further ordered, That respondent shall maintain for a period of five (5) years after service of this order upon it, records that shall show the manner and form of respondent's continuing compliance with the above terms and provisions of this order and make them available for inspection by Commission staff within thirty (30) days of receipt of notice that an inspection is sought.

OPINION OF THE COMMISSION

By Azcuenaga, *Commissioner*:

This case is before the Commission on cross appeals from an Initial Decision by Administrative Law Judge Ernest G. Barnes granting complaint counsel's motion for summary decision. Judge Barnes found that Orkin Exterminating Company ("Orkin") has engaged in unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1982) ("Section 5"), by unilaterally raising the fixed annual renewal fee on certain of its termite control contracts. We affirm.

Orkin, the self-proclaimed largest termite and pest-control company in the world, sells its pest-control and exterminating services to consumers for their homes and other structures. From 1966 until February, 1975, Orkin offered contracts for pest control and repair services with guarantees for the lifetime of the treated structure as long as the consumer paid a specified annual renewal fee. In 1980, citing the need to recoup some of its rising costs, Orkin decided to raise the renewal fees on [2] these contracts. The contracts, however, contained no express language authorizing such an increase. Instead, they offered "lifetime" guarantees and specified payments in stated amounts beginning on a particular date and on the same date each year "thereafter."

The Commission issued its complaint on May 8, 1984.[1] The complaint alleges that Orkin's increase of its annual

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1. In response to an unopposed motion by complaint counsel, Paragraph 3 of the complaint was amended on November 15, 1984, to include the words "and wood decay" in the description of the contract services offered by Orkin.

renewal fees has caused substantial, ongoing and unavoidable injury to Orkin's customers and the public that is not outweighed by countervailing benefits to consumers or to competition. It charges that the company's action has violated Section 5. After a period of pretrial discovery, complaint caunsel moved for summary decision with respect to all issues. Orkin opposed the motion and made a cross-motion for summary decision. Orkin also submitted "statements of material facts" that it contended either directly contravene complaint counsel's findings of fact or raise genuine issues of inference and legal significance that foreclose entry of summary decision in favor of complaint counsel. The Administrative Law Judge granted complaint counsel's motion for summary decision and issued his Initial Decision.

Both Orkin and complaint counsel have appealed. Orkin challenges the Initial Decision on several grounds. It objects to the issuance of a summary decision, asserts that the challenged conduct is outside the scope of Section 5, takes issue [3] with various findings and conclusions and asserts that the order is unduly burdensome and does not bear a reasonable relation to the alleged practice it purports to remedy. Complaint counsel's appeal is limited to the assertion that the ALJ improperly limited the scope of the order.

FINDINGS OF FACT

These findings, which we have drawn from the Initial Decision and from the parties' filings, reflect only those facts that are not subject to genuine dispute.

I. THE RESPONDENT

Orkin is a Delaware corporation with its principal place of business in Atlanta, Georgia. IDF 1.[2] It is a wholly-owned subsidiary of Rollins, Inc. ("Rollins"), by which it was acquired in 1964. *Id.* During the time covered by the complaint, Orkin provided pest-control and exterminating services throughout the United States, operating through branch offices under the supervision of a number of district offices. IDF 2; RIR 32; CX 142Z9; Russell Dep. p. 9; Raymond Dep. p. 32. Orkin has stipulated that it maintains, and at all times mentioned in the [4] complaint has maintained, a substantial course of business, including the acts and practices set forth in the complaint, in or affecting commerce within the meaning of Section 5. IDF 3.

Orkin claims to be the world's largest termite and pest-control company. IDF 4. The company's services include treatment of houses, buildings and other structures to destroy or protect against termites, other wood-infesting organisms, moisture and wood decay. IDF 7. Orkin charged a specified amount for the initial treatment of the affected structure, and, under certain con-

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2. We use the following abbreviations in this opinion:

I.D. Initial Decision

IDF Initial Decision Finding

RAB Respondent's Appeal Brief

RRB Respondent's Reply Brief

RIR Respondent's Answer to First Set of Interrogatories

CX Exhibit to Complaint Counsel's Motion for Summary Decision

RX Exhibit to Respondent's Motion for Summary Decision and Opposition to Complaint Counsel's Motion

RPF Respondent's Proposed Findings of Fact.

ditions, it has issued guarantees of the termite control services provided under its contracts. IDF 8. Since prior to 1956, Orkin has prepared and used its own preprinted form contracts and guarantees that are not subject to modification by its salesmen. IDF 10.

II. ORKIN'S PRE-1975 CONTRACTS

Before 1966, Orkin generally offered guarantees for continued protection of the treated property at a specified price for an express term of from five to fifteen years. IDF 11. In 1966, Orkin began offering a guarantee for continued protection that would last the lifetime of the treated structure, and the company began using the term "lifetime" in its contracts and guarantees. IDF 11, 26. Orkin was able to offer this initial treatment and lifetime continuing guarantee package, because the primary termiticide it used "was proving to be more successful and more effective than [Orkin] ever thought it would be." IDF 12. Orkin used the lifetime concept as a competitive device "to try to offer a distinctly better service to the public than [its] [5] smaller competitors could offer." IDF 12; Geiger Dep. pp. 16-17. Orkin offered several kinds of lifetime guarantees, including a lifetime retreatment guarantee, a lifetime retreatment and repair guarantee and a lifetime guarantee on pretreatment work on new construction. IDF 13. Generally, the first two of these guarantees provide that after initial treatment and at no extra cost to the customer, Orkin respectively will retreat the covered structure if new infestations occur and make repairs (up to a stated dollar maximum) if it is established that the new damage occurred after the initial treatment. IDF 13-16. The pretreatment guarantee is similar but applies

to new construction rather than to existing structures. IDF 17.

Between January, 1966, when Orkin first started using "lifetime" in its contracts, and February 1, 1975, Orkin's termite contracts and guarantees provided that the consumer must pay a specified annual fee in order to continue the coverage of the guarantee. IDF 18. If the customer continued to pay the renewal fee, the guarantee remained in effect for the lifetime of the treated premises, unless they were structurally modified after their initial treatment. IDF 18-19 and 26. The contracts stated explicitly that the company could adjust the fee in the event of structural modification (IDF 19), but they made no other [6] provision for adjustment of the renewal fee.[3] The language in these agreements, which we refer to in this opinion as "pre-1975" contracts,[4] varied slightly from time to time within the 1966-1975 period, but it is undisputed that all of the contracts contained terms similar to those quoted below.

For example, CX 2A, a contract dated November 30, 1966, specifies an Annual Renewal Premium of $17.00 and provides:

> In addition to the initial term specified in Paragraph 1 above, the Guaranty may, at the sole option of

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3. Before 1966, Orkin's form contracts for an express term of years specifically provided for increases in the annual renewal fee that did not depend upon structural modification of the treated structure. IDF 23. On or about February 1, 1975, Orkin began using a similar provision for fee increases in its lifetime guarantee contracts that did not depend on structural modification. IDF 24.

4. Because it is the term used by the Administrative Law Judge in the Initial Decision and for convenience, we use the term "pre-1975" as an abbreviation for the period of time from January, 1966, to February 1, 1975.

> the undersigned, be renewed annually for Lifetime additional years by making payment of the Annual Renewal Premium on or before the renewal date of each subsequent year and Orkin agrees to reinspect the premises upon receipt of each Annual Renewal Premium Payment. [The underlined word was handwritten in a blank space provided in the contract.]

Similarly, CX 414A, a contract dated February 5, 1972, provides for a "Lifetime Control and Repair" guarantee and states:

> ORKIN CONTINUOUS PROTECTION GUARANTY Orkin's Continuous Protection Guaranty will provide protection for the above named property including Annual Reinspections upon payment of the initial charges and an annual renewal Payment of $37.00 starting February 1973 and each February thereafter. [The underlined words were handwritten in blanks provided in the contract.]

See also IDF 22-23. [7]

The pre-1975 contracts generally contained a clause stating that the contract, graph and specification sheets, and, upon issuance, the guarantee, constituted the complete agreement between the parties. IDF 21. They provided that the agreement could not be changed or altered in any manner, oral or otherwise, by any representatives of Orkin, unless the alterations or changes were in writing and executed by a corporate officer of Orkin under the corporate seal. IDF 21-23. For example, some of Orkin's pre-1975 contracts contained the following language:

> It is understood and agreed between the parties that this Contract, the Graph and Specification Sheets

> which bear this Contract Number and, upon issuance, the Guaranty constitute the complete agreement between the parties and that said agreement may not be changed or altered in any manner, oral or otherwise, by any representative of ORKIN unless alteration or change be in writing and executed by a corporate officer of ORKIN EXTERMINATING COMPANY, INC., under this corporate seal. [CX-9B. *See also, e.g.*, CX-10B, 11B, 12B, 13B, 14B, 16B, 19B, 20B, 24B, 25B, 400B, 414B, 473B and 485B; *see also* IDF 21.]

Other Orkin contracts used during the pre-1975 period stated:

> It is understood and agreed that ORKIN and the Buyer are bound only by the terms and conditions of this agreement and not by any other representations, oral or otherwise. [CX-449B, ¶8. *See also, e.g.*, CX-1A, 2A, 3, 4A, 5A, 6A, 9A, 12B and 21B; RIR 59-60; *see also* IDF 21.]

The company does not dispute that its pre-1975 contracts used these clauses or clauses of a similar nature.

III. ORKIN 12 ADVERTISING CAMPAIGN

For several months during 1968, Orkin promoted sales of its termite control services through an advertising campaign called "Orkin 12." The promotion was advertised in a pamphlet, on billboards, in magazines and on radio and television. IDF 27. The pamphlet contained the following language: [8]

> LIFETIME GUARANTEE. Orkin's lifetime termite protection plan includes annual reinspections and re-

> treating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection *is very modest and never increases.* In case of a sale, the guarantee is transferable.

IDF 28; Raymond Dep. Ex. 6 at 2. [Emphasis in original.] The Orkin 12 advertising campaign was in effect for approximately six months but was discontinued before its scheduled expiration date because it failed to produce sufficient consumer sales leads. (Geiger Dep. pp. 34-35); IDF 27.

IV. RENEWAL FEE INCREASE

By late 1978, Orkin had begun to explore the possibility of increasing the annual fee on its pre-1975 contracts and guarantees. Orkin asked James M. Schneider, General Counsel of Rollins, Orkin's parent company, whether the contracts provided a basis on which to increase the renewal fee. He initially concluded that they did not. IDF 55. He stated:

> Well, I looked at the contract, and I recall that my reaction was the reaction that—or my initial reaction was that of most people that reviewed the contract. I didn't see offhand a basis for increasing the prices. The provision concerning the renewal prices appeared to be of indefinite duration using words like "hereafter" or "thereafter," and my instant or immediate reaction was there simply was not a basis for increasing the prices.

Schneider Dep. (2/8/85) p. 19. Later, after "he had pondered" the question "for days and days, . . . it struck

[him] that no company in its right mind would ever issue a contract that provided for ongoing services in perpetuity without a right to increase prices." *Id.* [9]

After considering the question himself, Mr. Schneider requested advice from the company's law firm. The firm's two and a half page, unsigned memorandum, dated December 6, 1978, concluded that "the Orkin contract" (unidentified) "would appear to be of *indefinite* duration" (emphasis in original) and, therefore, "would be terminable by Orkin after a reasonable period of time." RX 44A-C; IDF 39. The memorandum does not purport to construe a particular Orkin contract. Nor does it refer to or quote language from any specific Orkin contract. It is explicitly limited to the issue: "Are there any grounds for the claim that a contract which may be renewed or extended from year to year, indefinitely, is unenforceable." It is also explicitly based on the "assum[ption] that the Orkin contract involves a right to *extend the term of the original contract*" [emphasis in original]. IDF 40; RX-44A. The memorandum does not address the proper way to construe the term "lifetime" in a contract. Mr. Schneider reviewed the law firm's memorandum and endorsed its conclusion to Orkin's management. IDF 39.

In February, 1980, before deciding to increase the annual renewal fees on the pre-1975 contracts, Gary W. Rollins, President of Orkin, prepared a synopsis of issues for Rollins' President, R. Randall Rollins, setting out what he believed to be the merits and risks of the renewal fee increase and stating the available options. The single reason he identified in favor of the fee adjustment was the potential increase in income that it would produce. The points militating against the increase included the following: [10]

1. A few customers [were] advised by salesmen and literature that renewal amount would be fixed.

2. State regulatory agencies . . . could interpret our contract in some cases to imply the renewal amount is fixed. Those who obtain old proposal information will discover we put this in writing.

3. Our longer term employees might feel that we are going back on our word.

4. There could be customer lawsuits and complaints.

The options were:

1. Leave as is.

2. Write customers and put [the increase] on voluntary basis.

3. Meet with individual state regulatory and consumer groups to obtain understanding and raise [fee].

4. Raise [fee] and handle exceptions.

IDF 43; Rollins Dep. Ex. 12. Gary Rollins attached to his memorandum the Orkin 12 promotional pamphlet describing the "yearly premium" that "never increases." IDF 45; Rollins Dep. Ex. 12.

Shortly thereafter, Orkin decided to raise the annual renewal fees on the pre-1975 contracts, and the company began notifying the affected customers in August 1980, giving them several months' notice before renewal payments were due. IDF 46 and 48. The annual fees were raised to a minimum of $25 or by 40%, whichever was greater. IDF 50. Orkin sent price increase [11] notices

to approximately 207,000 customers.[5] By August 1, 1984, Orkin had increased the annual renewal fees of approximately 142,902 customers with pre-1975 contracts. By May 25, 1981, Orkin had received an additional $1,257,629 solely as a result of the fee increase to its pre-1975 customers, and estimates submitted in this proceeding show that it had received increased revenues through 1984, from the same source, of $7,515,674.

Orkin's announcement brought complaints from customers, who expressed the belief that Orkin did not have the right to raise the renewal fees for pre-1975 contracts. It also brought communications from officials of at least seventeen states, who questioned the lawfulness of Orkin's action. IDF 51 and 73-85.[6]

Customers had few, if any, alternatives to paying the higher fee. Although they could seek to have Orkin's competitors assume the pre-1975 contracts at the initial renewal fee, competitors apparently would not have assumed the contracts without imposing [12] conditions that would have resulted in additional charges to Orkin's customers or subsequently raising the renewal fees as ex-

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5. The figures in this paragraph appear in the Initial Decision and reflect information produced by the respondent. *See* IDF 64-67 and findings cited therein.

6. Six of these states, while not conceding that Orkin's fee increase was legal, have accepted some form of accommodation for those Orkin customers within their jurisdictions who have complained about the fee increase either to Orkin or to state officials. IDF 86. In *State ex rel. Guste v. Orkin Exterminating Co.*, No. 83-2166 (Dist. Ct. La., Orleans Parish, Feb. 25, 1986), the court held Orkin liable for breach of its pre-1975 contracts based on the fee increase and declared the breach an unfair trade practice under state law. *See also Orkin Exterminating Co. v. Department of Health & Rehabilitative Services*, No. 81-389 (Fla. Cir. Ct. Oct. 21, 1981), *aff'd per curiam* (Fla. Dist. Ct. App. 1982) (CX 248A-D) (holding, on a stipulated record, that Orkin's pre-1975 contracts provided for a fixed annual renewal fee).

pressly permitted in their own contracts.[7] Indeed, Orkin's President, Gary Rollins, testified, when asked whether he believed competitors would accept the transfer of the pre-1975 contracts and provide the same lifetime guarantee for the annual fees stated in the contracts, that he "would doubt" that competitors would do that.[8]

Ron Kimbell, Director of Rollins' Customer Service, wrote a letter to Orkin's President, Gary Rollins, dated August 11, 1980, stating that, "[a]fter reviewing these contracts . . . I have concluded that the pre-1975 increase is more questionable than ever." IDF 53; Kimbell Dep. Ex. 10. Mr. Kimbell requested that the fee increase program be "suspended immediately until such time as all parties involved . . . [within the company] can meet and discuss [its] repercussions . . . ." *Id.* [13]

V. ACCOMMODATION EFFORTS.

Orkin did not suspend the fee increase program, but, instead, developed a form letter to respond to complaining customers and created some limited exceptions to the program. Orkin refers to the exceptions and its procedures for granting them as its "accommodation" pro-

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7. It was not the practice of Terminix, the second largest firm in the industry (after Orkin), to assume other contracts and, when it did so "on occasion," it normally would require reinspection and possible retreatment, apparently at the customer's expense. Hromada Aff. ¶8. Another firm required the customer to produce a "certificate" showing when the property was last treated and also required a "booster retreatment" when considered necessary. Murphy Aff. ¶4. The contracts attached to competitors' affidavits expressly permit the companies to raise or renegotiate their renewal fees after specified periods of time ranging from four to six years following initial treatment. *See* exhibits to affidavits of Hromada and Tindol; *see also* exhibit to Nolen Aff.

8. Rollins Dep. at 210.

gram. RAB 11. In the form letter, Orkin cited the impact of inflation as the reason for the increase and stated that "this increase is both consistent with law and reasonable business standards." IDF 56; Kimbell Dep. Ex. 6. The form letter said nothing about the company's decision to grant certain exceptions from the general fee increase. *Id.*

In a memorandum dated August 13, 1980, John Raymond, Orkin's Director of Administrative Operations, reiterated to Orkin's branch managers the points made in the form letter but added special instructions for customers who claimed that they had sales literature stating that the renewal fee would not be raised. He referred specifically to the Orkin 12 promotion. IDF 57. Mr. Raymond, in effect, directed the Orkin sales force to insist that complaining customers demonstrate that they had relied upon the Orkin 12 promotion. If, but only if, such a demonstration was made, the salesmen were instructed to inform the customer that Orkin would retract the fee increase. *Id.* Approximately a year later, Orkin decided to roll back the increase for all customers who had entered into their contracts in 1968, the year during which the Orkin 12 promotion had been used. IDF 62. [14]

In a second memorandum to branch managers, Mr. Raymond said that Orkin was willing to make further exceptions to the general fee increase

> for customers who state that at the time of purchase they relied on either a sales presentation or they construed the specific wording of the contract to provide that the renewal price would not be increased . . . provided that this exception to the general price increase is not abused. It is our chief desire to maintain the goodwill of these customers.

He added:

> We are willing to make exceptions to give certain customers the benefit of the doubt. While we intend to be flexible in our evaluations, you should be alert to any abuses, particularly where complaints from customers exceed 1% of the affected customer base.

IDF 58; Rollins Dep. Ex. 23 at 2.

As of August 1984, under its accommodation program, Orkin had granted roll backs to approximately 21,500 pre-1975 customers. IDF 67. Some 15,800 of these customers were subject to the general exception for 1968 contracts. IDF 63, 67. Between August 1980 and August 1984, some 42,600 consumers cancelled their pre-1975 contracts. IDF 66. Although Orkin considered additional increases in the annual renewal fees on pre-1975 contracts, after it had implemented the first increase, it did not do so. IDF 68. Orkin also considered ways to convert [15] pre-1975 customers to a new contract that would permit the company to raise the renewal fees again in the future. IDF 69.[9]

CONCLUSIONS OF LAW

The issue before us is whether Orkin has engaged in an unfair act or practice under Section 5 by unilaterally increasing the renewal fees in its pre-1975 contracts. This is not an action at common law for simple breach of contract. Rather it is an action under a federal statute that makes unlawful conduct causing injury to consumers that

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9. In November, 1981, Orkin's figures show that the pre-1975 contracts comprised about 33% of the company's termite renewal customer base in numbers and less than 25% in dollars. Those figures were expected to "drop naturally through normal attrition over the years." RX 94C.

is substantial, unavoidable and without countervailing benefits. Because determining whether Orkin's conduct was "unfair" depends in large part on what consumers properly could have expected from Orkin under the pre-1975 contracts, we focus first on those contracts before addressing the merits of the unfairness allegations.

I. SUMMARY DECISION

In assessing both Orkin's contract obligations and the unfairness of its conduct, we also must consider the propriety of proceeding by way of summary decision. Under Commission Rule 3.24(a)(3),[10] a party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine [16] issue of fact for trial." The purpose of the summary decision procedure, as articulated in the 1963 Advisory Committee Notes to Rule 56 of the Federal Rules of Civil Procedure, is to determine "whether there is a genuine need for trial."[11] The Commission cannot try issues of fact on a motion for summary decision but can only determine whether there are issues to be tried.[12]

The standard for deciding when summary judgment is appropriate is whether the pleadings and any affidavits or other documents on the summary decision record raise

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10. 16 C.F.R. 3.24(a)(3) (1986).

11. The Commission has long accorded deference to the case law on Rule 56 of the Federal Rules of Civil Procedure in construing the meaning of its own rule. *See, e.g., The Hearst Corp.* 80 F.T.C. 1011 (1972); *Lehigh Portland Cement Co.*, 78 F.T.C. 1556 (1971). *See also Kroger Co.*, 98 F.T.C. 639, 728 and n.10 (1981); *American Medical Ass'n*, Dkt. 9064, (April 26, 1976) (Order Denying Motion of Respondent for Summary Decision).

12. *Heyman v. Commerce and Industry Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975).

genuine disputes of material fact, assuming that ambiguities in those documents and any factual inferences to be drawn from them are construed against the moving party.[13] To forestall summary judgment, the nonmoving party may not simply rely on unsupported assertions but must set forth specific facts that reveal genuine disputes necessitating trial.[14] To determine whether genuine disputes of material fact exist, we must consider three questions: first, whether any disputes Orkin has raised are factual; second, if so, [17] whether they relate to material or outcome-determinative issues; and third, assuming the answers to the first two questions are affirmative, whether the factual disputes are genuine—that is, substantiated in the documentation presented by the parties by more than mere assertions or *post hoc* rationalizations.[15]

The issues Orkin has raised are, for the most part, legal rather than factual. To the extent that they involve matters of fact, those facts are not material to our decision, because their resolution in the manner suggested by the respondent would not alter our decision.[16] For example, Orkin cites the reaction of state attorneys general to Orkin's fee increase and increases in renewal fees for customers holding contracts entered into after February, 1975. Both are plainly irrelevant. Orkin also

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13. *See, e.g., Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986).

14. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 482 (1983) (hereafter "Schwarzer").

15. *Id.* at 469, 484.

16. *See, e.g., Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984); *United States v. First Nat'l Bank of Circle*, 652 F.2d 882, 887 (9th Cir. 1981).

opposes reliance on evidence concerning a portion of an alleged employee training manual as a statement of company policy and the uniformity of Orkin's efforts to train its sales force. We do not rely on this evidence.

To the extent that Orkin's alleged factual disputes purport to place at issue the intent of the parties to Orkin's pre-1975 contracts, we conclude, as discussed in Section II, below, that the disputes are not genuine. To the extent that they are based on unsupported assertions and conclusions drawn after-the-fact, they do not meet the standard of Rule 3.24(a)(3). [18]

Some of Orkin's points of disagreement, such as those concerning the proper interpretation of the company's pre-1975 contracts, do not constitute issues of pure fact. Instead, they are issues of mixed fact and law, and whether they must be tried depends on which feature predominates. Mixed issues, according to Judge Schwarzer:

> are properly decided by the court and are therefore appropriate for summary judgment if the underlying historical [pure] facts are not disputed. That is true even though the process of decision requires the trial court to "weigh the evidence" on both sides of the argument in deciding what ultimate fact to derive.[17]

The question of how to treat the distinction between fact and law (including law mixed with fact) frequently arises with specific reference to the interpretation of contracts. The question of the meaning of the words of a contract, is a question of fact, but, as Professor Corbin states, "it may be a question that should be answered

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17. Schwarzer, at 473. *See also* Note, *Factors Affecting the Grant or Denial of Summary Judgment*, 48 Colum. L. Rev. 780 (1948).

by the judge rather than by the jury."[18] Although in a Commission adjudication, there is no jury, the theoretical assignment of the issues as they might be assigned in court is useful in determining when it is appropriate for the Commission to decide issues without trial.

As Professor Corbin has observed, "in very many cases where the contract is in writing the interpretation of its language has [19] been held to be for the court and not for the jury."[19] The law is clear that the court may undertake the interpretation of a written contract without a trial if the contract language is both undisputed and unambiguous.[20] Where it can be determined that the "historical" facts concerning a written contract are not substantially in question—that is, that the words of the instrument are "definite and undisputed"[21]—the next question is whether the meaning of the contract is nonetheless ambiguous. The existence of ambiguity is a question of law to be decided by the court.[22] The court may properly determine that an instrument is unambig-

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18. 3 A. Corbin, *A Treatise on the Law of Contracts*, § 554 at 220-21 (1960) (hereafter "Corbin").

19. *Id.* at 225 (footnotes omitted). *See also* note 13, *supra;* Restatement (Second) of Contracts (hereafter "Restatement") Section 212 comment d (1979).

20. *See Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 940 (2d Cir. 1980).

21. Corbin § 554 at 224.

22. C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2730.1 at 279 (2d ed. 1983) (hereafter "Wright, Miller & Kane"). *See, e.g., Gomez v. American Elec. Power Service Corp.*, 726 F.2d 649, 651 (10th Cir. 1984); *Scott Paper Co. v. Taslog, Inc.*, 638 F.2d 790, 796 (5th Cir. Unit B 1981); *Freeman v. Continental Gin Co.*, 381 F.2d 459 (5th Cir. 1967). *See also, e.g., Amrep Corp.*, 102 F.T.C. 1362, 1663-64 (1983), *aff'd*, 768 F.2d 1171 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 1167 (1986); *Horizon Corp.*, 97 F.T.C. 464, 842-46 (1981).

uous notwithstanding that the parties do not agree on the construction of the contract, that a party has [20] asserted that the contract is ambiguous[23] or that the parties have introduced extrinsic evidence bearing on intent.[24] If the court concludes that no reasonable ambiguity exists, it may proceed without trial to interpretation or construction of the contract.[25]

We conclude, as explained below, that summary decision is proper in this case.

II. ORKIN'S CONTRACTS

At the outset, we consider whether we properly may rely on the contract terms alone or whether it is necessary to consider extrinsic evidence to ascertain the meaning of the contract. Although, under some circumstances, examination of extrinsic evidence might be indicated, such an examination need not be undertaken where the contracts at issue are integrated documents, that is, they embody the complete and final agreement between the [21] parties.[26] According to the *Restatement*, one of the

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23. *Freeman v. Continental Gin Co.*, 381 F.2d 459, 465 (5th Cir. 1967).

24. *Scott Paper Co. v. Taslog, Inc.*, 638 F.2d 790, 796 n.4 (5th Cir. 1981).

25. *See, e.g., Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936 (2d Cir. 1980); *Parish v. Howard*, 459 F.2d 616 (8th Cir. 1972); *Freeman v. Continental Gin Co.*, 381 F.2d 459 (5th Cir. 1967). Although some commentaries draw a distinction between "interpretation" and "construction" of contracts, the terms are "generally regarded as synonyms and used interchangeably." *See, e.g.*, 4 S. Williston, *A Treatise on the Law of Contracts*, § 602 at 320 [footnote omitted] (3d ed. 1961) (hereafter "Williston").

26. Even contracts purporting on their face to be integrated instruments, under some circumstances, may be shown to depend

(Continued on following page)

principal effects of a binding integrated agreement is "to focus interpretation on the meaning of the terms embodied in the writing."[27] The pre-1975 contracts contain integration clauses stating clearly that Orkin considered the materials listed in those clauses (the contract, the graph and specification sheets and, upon issuance, the guarantee) to constitute the entire agreement between the parties and that no other understanding or representations were intended to be part of the agreement.[28] We therefore look solely to the contract documents to ascertain their meaning.

Having focused on the terms of the pre-1975 contracts, we conclude that they are unambiguous. It is undisputed that they [22] refer to "lifetime" services and guarantees. They specify an annual renewal fee, and they contain no language that suggests in any way that the renewal fee

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Footnote continued—

on prior agreements between the parties necessitating consideration of those agreements. Here, however, the record contains no evidence of any prior agreements, and we may rely on the integration clauses. Nor is this a case in which the integration clause itself is at issue under Section 5. *See Amrep Corp.*, 102 F.T.C. 1362, 1667-68 (1983), *aff'd*, 768 F.2d 1171 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 1167 (1986); *Horizon Corp.*, 97 F.T.C. 464, 847 (1981).

27. Restatement, Ch. 9, Topic 3 at 114.

28. Orkin has made no showing of intent outside the corners of the contracts except by way of *post hoc* rationalization and unsupported assertions. These are insufficient to meet the company's obligations under Rule 3.24(a)(3) "to set forth specific facts showing that there is a genuine issue of fact for trial." 16 C.F.R. 3.24(a)(3) (1986). *See also* J. Moore & J. Wicker, *Federal Practice* ¶56.17[11] at 56-778 through 56-779 (2d ed. 1985) (hereafter Moore & Wicker); *Worth v. Orkin Exterminating Co.*, 142 Ga. App. 59, 60, 234 S.E.2d 802 (1977) (upholding Orkin's refusal to give effect to an oral contract alleged by a customer because "provisions of the written contract clearly contravene such action" and "parties are bound only by the terms of the written agreement").

may change during the lifetime of the treated structure or that the duration of the stated renewal fee is different from the "lifetime" duration of the guarantee, assuming timely annual payments. The contracts provide expressly for fee adjustments in circumstances involving extension of the guarantee where the treated premises have been structurally modified. This express provision for certain adjustments makes the absence of language anticipating other adjustments even more significant. Orkin would not have needed to provide expressly for fee increases in the context of structural modification had the company intended such fee increases to be permissible generally. The fact that the contracts Orkin used before 1966 and after 1975 contain express language permitting renewal fee increases regardless of whether structural modification occurred[29] also strongly suggests that the contracts at issue are properly read to provide for a fixed renewal fee. Orkin specifically deleted the clause that permitted general fee increases when it began offering lifetime guarantees, and it specifically added the clause again in February, 1975.

The lifetime guarantee is a major feature of the pre-1975 contracts that consumers were unlikely to overlook. The first page of the pre-1975 contract contains a series of guarantee options, such as "Lifetime Control and Repair," "Lifetime [23] Control" or "Control Only," from which the customer could choose. Each option is accompanied by a check-off box for recording the appropriate choice. In choosing a lifetime guarantee from the available options, the customer necessarily had to focus on the term. Also on the first page, as shown in the ex-

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29. *See supra* note 3.

amples quoted above,[30] the description of the renewal fee provision often contains a blank space into which the term of the renewable guarantee was handwritten, once more focusing the customer's attention on the lifetime guarantee. On the second page of the contract, the word "lifetime" again appears prominently, this time in the description of the guarantee. In this context, it is generally found in bold print, capital letters or both, often with the entire description enclosed in a box setting it off from the rest of the material on the page.

Orkin, although conceding the language of the contracts, argues that they are ambiguous and that extrinsic evidence will reveal factual issues that make summary decision improper. When the language of a contract is unambiguous,

> the operation of the parol evidence rule will preclude the introduction of outside evidence to dispute its terms and summary judgment is particularly appropriate.[31]

Having found, as a matter of law, that the contracts are integrated agreements that are not ambiguous, we need not review extrinsic evidence. Although we believe the meaning of the [24] contracts is clear, we have examined the entire summary decision record to ascertain whether it reveals genuinely disputed issues of material fact as Orkin has alleged. We find none. Indeed, to the extent that extrinsic evidence in the record is reliable and pro-

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30. *See supra* p. 6.

31. Wright, Miller & Kane § 2730.1 at 282. *Accord,* Moore & Wicker ¶56.17[11] at 56-779; *see Sullivan v. Massachusetts Mut. Life Ins. Co.,* 611 F.2d 261, 264 (9th Cir. 1979).

bative, it supports our conclusions based on the contracts themselves.

Orkin argues that the contracts are silent regarding the length of time that the renewal fee will remain at the stated level and that the Commission must give weight to extr nsic evidence concerning the parties' intentions. Orkin notes the testimony of its vice president, Earl Geiger, that "[n]o one at Orkin who participated in the decision to offer a 'lifetime' guarantee intended or even contemplated that the initially stated annual renewal rate would never be increased for the lifetime of the guarantees."[32] But subjective, uncommunicated intent is not relevant to the interpretation of a contract. As the courts have made clear: [25]

> It is well-established that intent is relevant to proper interpretation of a contract only if it is expressed by one party to the other, not if it be kept secret.[33]

Based on Mr. Geiger's testimony, Orkin asserts that its contracts should be construed in two isolated "segments": the lifetime guarantee and the annual renewal option with its provision for a fee. Orkin contends that the second segment does not expressly state for how long

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32. Geiger Aff. ¶6; Geiger Dep. at 38, 40. Orkin also cites the affidavit of Kenneth J. Boudreaux, an economist. Dr. Boudreaux's testimony, however, like that of Mr. Geiger, simply provides a *post hoc* rationale for Orkin's conduct. He states, for example, that "the promise of an indefinitely fixed annual renewal premium would not be economically rational. . . ." The testimony of Dr. Boudreaux may tell us something about Orkin's business acumen, but it tell us precious little about Orkin's intentions. Companies can make decisions that they later regret as having been economically irrational.

33. *Goldberg v. Bramson Publishing Co.*, 685 F.2d 224, 228 (7th Cir. 1982) (citations omitted). *Accord*, Restatement § 200 comment b; Williston § 606 at 373-75.

the customer may continue to opt for annual renewals at the stated renewal fee. Therefore, the argument goes, this part of the agreement constitutes a perpetual contract, enforceable only for a reasonable period of time. This argument necessarily implies that each document that we have treated as a single contract is, in fact, two contracts. Although most of the contracts in the record are more than one page long, they are imprinted at the top, near the name of the company, with the words "Retail Installment Contract."[34] The box indicating that the customer selected a lifetime guarantee is on the same page as the provision for a specified annual renewal payment. The entire page is surrounded by a continuous geometric border of the sort often seen on printed form contracts. The integration clause, most frequently found on the second page, refers to "the complete agreement between the parties."

We see nothing whatsoever on the face of the document to suggest that it is anything other than a single contract, nor has [26] Orkin, aside from its conclusory assertion, provided any reason for the artificial distinction it proposes.[35] As we understand it, Orkin's position is simply that, although the agreement refers to a specified fixed fee, the company can raise the fee unilaterally after a reasonable period of time has passed. This argument is

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34. *See, e.g.*, CX-9A, 11A, 12A, 13A, 14A and 16A.

35. Our reading of the contracts is consistent with the rule that "[a] writing is interpreted as a whole and all writings that are part of the same transaction are interpreted together." Restatement § 202(2). *Accord*, A. Corbin, *Corbin on Contracts*, 521 (one volume ed. 1952); *Hill & Range Songs v. Fred Rose Music, Inc.*, 570 F.2d 554 (6th Cir. 1978); *see Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d 856, 860-61 (Utah 1978) (rejecting contention that the duration of an assessment for continuation of a water right was severable from the provision of the contract establishing the duration of the water right).

no more than a partially obscured articulation of Orkin's apparent belief that the company can read any contract provision out of context if it would be in its interest to do so.

Orkin's argument conveniently overlooks the contracts' use of the term "lifetime"—a term conceded to mean the life of the treated structure. Language making the duration of contractual obligations dependent on an ascertainable fact or event, such as the existence of a particular structure, is sufficient to render the duration of the contract definite and certain. Courts have held that contracts "may be uncertain as to point of time when [they] will terminate, [so long as] there is no uncertainty as to the event which will bring about [their] termination. . . ."[36] A contract "need not state a period" during which obligations may [27] be performed provided that "it states that mode by which the length of such period may be determined."[37]

The mere fact that a contractual obligation may extend for a considerable length of time does not undermine the certainty of its duration or make its duration perpetual or indefinite. Orkin's lifetime guarantee is no less definite or ascertainable than a life insurance contract,[38] and, since

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36. *Fuchs v. United Motor Stage Co.*, 135 Ohio St. 509, 21 N.E.2d 669, 672 (1939); *accord, Pallange v. Mueller*, 206 Wis. 109, 238 N.W. 815 (1931); 17 Am.Jur.2d § 80.

37. 80 ALR 1454, 1473. *See Phelps v. Shawprint, Inc.*, 238 Mass. 352, 103 N.E.2d 687, 689 (1952); *Fuchs Motor Stage Co.*, 21 N.E.2d at 672; *Pallange*, 238 N.W. at 816.

38. *See generally* Appleman, *Insurance Law and Practice*, §§ 101-112 (1981). *See also Burnet v. Wells*, 289 U.S. 670, 679 (1933), *quoting New York Life Insurance Co. v. Statham*, 93 U.S. 24, 30 (1876) (holding that a life insurance policy " 'is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium.' It is 'an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums.' ")

it does not extend beyond any structural modification, probably no longer. Quite apart from principles of law, common sense and Orkin's own documents belie the notion that the pre-1975 contracts are perpetual.[39]

The Commission, therefore, does not agree that the contracts are silent or indefinite with respect to the period for which the level of the stated renewal fee will remain constant.[40] We have concluded that the duration of the lifetime guarantee and the [28] duration of the fixed renewal fee are one and the same. Orkin has not suggested the existence of any prior or contemporaneous evidence (written or oral) that supports Mr. Geiger's assertions to the contrary. Orkin has made no showing that, despite the language of the contracts, it gave its customers any reason to think that the duration of the level of the renewal fee might differ from the duration of the guarantee itself.[41]

To the extent that the record contains credible and reliable extrinsic evidence, it shows that a fixed renewal fee was intended. The only extrinsic evidence of a contemporaneous representation is the Orkin 12 advertising campaign, which boasts of a yearly premium that never

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39. Houses do not last forever absent structural modification. The number of pre-1975 guarantees in effect will drop naturally through "normal attrition over the years." RX 94C.

40. The cases Orkin cites in support of its position are not relevant. *See* RAB 23-24, ns. 12 and 14. These cases either proceed on the assumption that the contracts at issue were silent or ambiguous with regard to their duration or that reliance on extrinsic evidence is otherwise necessary to determine their meaning.

41. A standardized form contract drafted by one party generally will be construed against that party. Restatement §§ 206, 211 comment b. *See also Horizon Corp.*, 97 F.T.C. 464, 844 (1981).

is not bound to follow judicial interpretations of state "little FTC Acts" in construing Section 5. It can restrain unfair business practices in interstate commerce "even if the activities or industries have been the subject of legislation by a state or even if the intrastate conduct is authorized by state law."[67] Although the state cases are not controlling, we would consider their reasoning if those cases more closely paralleled the case before us. They do not.

The state court decisions Orkin cites stand for the proposition that private controversies arising out of simple breaches of contract under certain state statutes do not violate those statutes.[68] This case is not a dispute between private parties. The requirement under Section 5 that the Commission determine that an enforcement action is in the public interest [38] provides an essential feature missing in private actions brought under state laws. The Commission has made that determination here. Unlike the conduct in Orkin's state law cases, the conduct at issue in this proceeding is not the breach of a single contract but is rather a widespread, systematic program Orkin implemented to effect a unilateral modification of its own standard contract terms agreed to by many thousands of consumers.[69] Under the state statutes construed in the cases Orkin cites, the relief also differs fundamentally from that permitted under

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67. *Peerless Products v. FTC*, 284 F.2d 825, 827 (7th Cir.), *cert. denied*, 365 U.S. 844 (1960). *Accord, Spiegel, Inc. v. FTC*, 540 F.2d 287, 292-93 (7th Cir. 1976).

68. *See, e.g., Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc.*, 754 F.2d 10 (1st Cir. 1985); *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054 (1981).

69. *See supra* p. 11

Section 5. The state laws, unlike the federal statute, at least in some instances, provide for imposition of treble damages in private actions where violations are found.[70] Neither Section 5 generally nor the complaint in this proceeding seeks monetary damages.

We need not and do not find that every breach of contract subjects the breaching party to liability under Section 5. We simply conclude that the conduct at issue here falls within the scope of the Commission's authority under that statute.

IV. LIABILITY UNDER SECTION 5

Having found that Orkin's pre-1975 contracts provided for a fixed annual renewal fee for the life of the treated structure, we turn to the question whether Orkin's conduct in unilaterally raising the fees is an unfair act or practice in violation of [39] Section 5. Again we must consider the threshhold question whether summary decision is proper.[71] On the basis of undisputed facts in the summary decision record, the Commission concludes that summary decision is appropriate and that Orkin's increase of the annual renewal fees on its pre-1975 contracts constituted an unfair act or practice under Section 5.

A finding of substantial unjustified consumer injury is essential to a conclusion that a business act or practice is unfair under Section 5. *Horizon Corp.*, 97 F.T.C.

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70. *See, e.g.*, N.C. Gen. Stat. §§ 75-1.1(a), 75-16 (1985); Mass. Gen. Laws Ann. Ch. 93A, §§ 2(a), (11) (West 1984). *See also, e.g., Marshall v. Miller*, 276 S.E.2d 397 (N.C. 1981); *Pepsi-Cola Metro Bottling Co. v. Checkers, Inc.*, 754 F.2d 10 (1st Cir. 1985).

71. *See supra* pp. 14-16.

464, 847 (1981). In considering whether conduct is unlawful as an unfair act or practice, the Commission will consider whether the consumer injury is: (1) substantial; (2) not outweighed by an offsetting consumer or competitive benefits that the practice produces; and (3) one that consumers could not reasonably have avoided. *International Harvester Co.* 104 F.T.C. 949, 1061 (1984); *Amrep Corp.*, 102 F.T.C. 1362, 1669 (1983); *Horizon Corp., supra*, 97 F.T.C. at 849-50.[72] [40]

The Commission finds that Orkin's failure to honor some 207,000 pre-1975 contracts caused actual and substantial harm to consumers.[73] The harm resulting from Orkin's conduct consists of increased costs for services previously bargained for and includes the intangible loss of the certainty of the fixed price term in the contract. The breach also injured the market more generally by undermining consumers' ability to rely on the terms of fully integrated, standard form contracts used by businesses to simplify and facilitate routine transactions.

Although the financial injury to each individual customer is relatively small if measured on a yearly basis, Orkin's fee increase was not for just one year. Repeated payment of the higher yearly fee imposes a continuing and cumulative monetary burden on the consumer over the period of the contract. As Orkin's figures show,

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72. *See also FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n.5 (1972); *Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction*, letter from the FTC to Senators Ford and Danforth, December 17, 1980 ("Unfairness Statement"), reprinted at Trade Reg. Rep. (CCH), Transfer Binder, Current Comment 1969-1983 ¶50,421 at 55,948.

73. Unfairness cases, unlike deception cases, which focus on likely injury, usually involve actual and completed harms. *International Harvester Co.*, 104 F.T.C. at 1061.

the fee increases affected some 207,000 customers. We are not concerned with trivial or merely speculative harms, but an injury may be substantial if it does a small harm to a large number of people.[74] Over $7.5 million in increased renewal revenue in an approximately four year period,[75] at the unjustified expense of consumers, is not insubstantial. [41]

The Commission does not accept Orkin's apparent belief that it could alter the contract obligations unilaterally on the ground that they were of only "peripheral" concern to the other party at the time the contract was signed. The undisputed facts show that the level of the annual fee was of more than peripheral concern to consumers. It is true that evidence in the summary decision record suggests that some of Orkin's customers did not consider the guarantee or the level of the annual renewal fee to be a factor, or an important factor, in their decision to contract with Orkin.[76] This does not undercut our finding of consumer injury. As the Court of Appeals for the Seventh Circuit observed in *Basic Books, Inc. v. FTC*, 276 F.2d 718, 721 (7th Cir. 1960):

> The fact that petitioners had satisfied customers was entirely irrelevant. They cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Commission in respect

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74. Unfairness Statement at 55,948 n.12. *See also International Harvester Co.*, 104 F.T.C. at 1064 n.55.

75. IDF 46, 65 and I.D. at 70.

76. Trahant Dep. at 32; Albertson Aff. ¶7; Ashcraft Aff. ¶7; Hoffman Dep. at 27-28; Thompson Dep. at 22; and Terrebone Dep. at 21. *But see* Duley Dep. at record 2316. None of these affidavits provides evidence of consumer intent contemporaneous to execution of the contract.

> to them, by showing that others, even in large numbers, were satisfied with the treatment petitioners accorded them.

The large number of pre-1975 customers who objected to the company's fee increase amply shows that a great many customers believed the level of the renewal fee was of substantial [42] importance.[77] Even if some of Orkin's customers would have chosen to deal with Orkin rather than its competitors, with or without the promise of a lifetime guarantee, we need not find, for purposes of determining liability, that every consumer who could have been injured was, in fact, injured. We need only find that actual, substantial consumer injury resulted from the company's failure to honor its contracts.

Orkin asserts that there are genuine issues of material fact that cannot be resolved on the existing record regarding the extent to which consumers actually relied on a fixed fee and whether they "bargained" for a fixed fee. The materiality of a contract term need not be shown through evidence of negotiation between the parties. The Commission has presumed that all express claims are material and it also has presumed the [43]

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77. Orkin admits to a rate of complaints lodged by its pre-1975 customers of approximately 1-2% (RX 73 and G. Rollins Dep. p.119). Its figures show that almost 6000 customers actively sought and were granted relief from the fee increase. IDF 67. *See also* IDF 51. Its estimate is conservative. Its figure does not count customers with contracts signed in 1968 whose fees were unilaterally rolled back because they were patently inconsistent with the Orkin 12 advertising campaign. It does not include complaints made to state agencies rather than to Orkin. It does not include customers who, although perhaps unhappy with the increase, acquiesced without complaining or without complaining with sufficient vigor to secure a roll back. Nor does it account for some percentage of the approximately 42,600 customers who cancelled their contracts after the fee increase, some or many of whom may have done so because of the increase.

materiality of implied claims concerning cost.[78] We are dealing with express contract terms regarding cost.

The law creates a presumption that the signatories to an integrated contract relied on the terms of the instrument rather than outside understandings.[79] As Judge Barnes said:

> After making a contract, consumers are entitled to receive everything contracted for, whether it was the primary inducement or secondary inducement in the agreement. Any determination to permit only partial compliance with a contract, or to require performance of only the primary benefits of the contracts, would make a mockery of contract law and consumer protection.

Where the contracts in question are not only integrated but are also standardized form instruments, we do not find it necessary to examine whether consumers actually negotiated over particular terms in order to conclude that those terms are material to the "bargain" embodied in the

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78. *International Harvester Co.*, 104 F.T.C. at 1057. *See also, e.g., MacMillan Inc.*, 96 F.T.C. 208, 303-304 (1980) (nondisclosure of facts needed to permit calculation of cost found to be omission of material information); *Peacock Buick*, 86 F.T.C. 1531, 1562 (1975), *aff'd*, 553 F.2d 97 (4th Cir. 1977) (nondisclosure of added service charge to price of car found to be a material omission); letter from Federal Trade Commission to Congressman John Dingell (Oct. 14, 1983), reproduced as an appendix to Commission Decision and Order in *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174-183 at 182-83 and n.55. Although the presumption in *International Harvester* was stated, as it most often is, in the context of alleged deception rather than alleged unfairness, the concept of materiality is the same in either situation. As the Commission said in *International Harvester*, "The unfairness theory . . . is the Commission's general law of consumer protection, for which deception is one specific but particularly important application." 104 F.T.C. at 1064.

79. *See* Restatement Ch.9, Topic 3 at 114.

increases.[42] This constitutes reliable extrinsic evidence of the company's intentions regarding the meaning of its contracts unlike Mr. Geiger's or Dr. Boudreaux's unsupported, *post hoc* assertions. Orkin has not identified any other contemporaneous representation inconsistent with those of the Orkin 12 campaign. Nor is it significant that the Orkin 12 campaign lasted only six months, since there is no suggestion that it made inaccurate representations to consumers.[43] The campaign clearly promoted the lifetime concept articulated in the pre-1975 contracts, and the terminology [29] concerning annual renewal fees in those form contracts remained consistent throughout the pre-1975 period.[44]

Orkin asserts, citing the *Restatement*, that even an integrated contract must be construed "'in *light of the circumstances*'"[45] or, more specifically, "'in light of the relevant evidence of the situation and the relations of the parties, . . . usages of trade, and the course of dealings between the parties.'"[46] The relevant evidence shows a standard form contract designed by Orkin to embody an agreement between a commercial establishment and an individual customer not routinely or repeatedly involved in transactions of this nature. The relations of the parties and the likeilhood, as reflected by the lifetime guarantee, that its customers dealt with Orkin infrequently, support our reading that Orkin should be held to the terms of the contract as drafted.

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42. *See supra* pp. 7-8.

43. IDF 27; Geiger Dep. at 29-30, 34-35.

44. *Compare* RX 3, 6A *and* CX 429A *with* CX 2A, 4A, 9A, 400A, 414A, 421A, 439A, 468A, 473A, 485A, 515A, 520A, 521A *and* 554A.

45. RRB at 12, *quoting* Restatement § 212(1) (emphasis by Orkin).

46. *Id.* at 12, *quoting* Restatement § 212(1) comment b.

Orkin apparently attempts to establish a "usage of trade" by stating that it was "common industry understanding of virtually identical contract terms"[47] that annual renewal fees could be increased.[48] A "common industry understanding" or "usage of trade" may be relevant in interpreting contracts between members of an industry, their suppliers and customers who engage in [30] frequent transactions in the industry and so, presumptively, have become knowledgeable of any specialized terms of art used. The record evidence, viewed most favorably to Orkin, does not show such a common industry understanding. At most it shows that one other firm increased its annual renewal fees on "lifetime" control contracts "even though the contract did not expressly provide for such an increase."[49] The *Restatement* also says that neither party to a contract "is bound by a meaning unless he

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47. RRB at 15, *quoting* Restatement § 212(1) comment b (Orkin's emphasis omitted).

48. *See generally* Nolen Aff.; RX 661A-D.

49. Nolen Aff. ¶7. A careful reading of the other affidavits on which Orkin relies to demonstrate common practice in the industry shows that they do not support the proposition for which they have been advanced. Each of the contracts appended to those affidavits states that the company may raise or renegotiate its annual renewal fee after a period of years. *See* contracts attached to affidavits of Tindol, Hromada and Nolen. If anything, the contracts of Orkin's competitors tend to emphasize the difference between Orkin's pre-1975 contracts and contracts that permit fee increases and to confirm our reading. We cannot accept RX 661 B-D, a brief memorandum from an attorney in the Georgia Attorney General's Office, as evidence for this proposition either. The memorandum contains a general reference to complaints about fee increases in pest control contracts from homeowners who assumed that the contracts provided for a fixed price and a cursory discussion of the permissibility of such increases. It examines administrative options for addressing the problem, reflects no knowledge of particular contracts, does not address the proper construction of the term "lifetime" except to assume that contracts using it purport on their face "to continue

(Continued on following page)

knows or has reason to know it."[50] Orkin has not shown that its pre-1975 customers knew, or had reason to know, that it was Orkin's practice to increase the fees, much less that such conduct was common in the pest control industry. The fact that [31] many customers acquiesced in the fee increase is not proof that they knew of it in advance or agreed with Orkin's current reading of the contracts.

The cases Orkin cites in support of its argument are not comparable to the case at hand.[51] In *Gollberg v. Bramson Publishing Co.*, 685 F.2d 224, 227-28 (7th Cir. 1982), the court addressed a usage of trade question, but the contracting parties, a publisher and his employee, an advertising space representative, were both involved in the publishing business and could be considered conversant with its practices. The interpretation based on industry usage was also consistent with the language of the contract. Orkin's customers, on the other hand, had no reason to be familiar with industry practice and the usage of trade Orkin suggests is inconsistent with the language of the pre-1975 contracts.

In *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984), one of Tymshare's sales representatives challenged the contract language in the company's "Compensation Plan" regarding sales quota increases. In concluding that

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Footnote continued—

forever," and concludes that it is not appropriate "to advise callers that [the author's] office has previously approved the escalation of . . . annual fees" in lifetime contracts. The document simply does not tell us either that Orkin's particular contracts or its conduct were common or that such conduct was considered acceptable in the industry.

50. Restatement § 220 comment b.

51. RAB at 27.

the contract language permitted retroactive increases, the court accorded "some weight" to the interpretation Tymshare gave to other employees "as demonstrating the past interpretation of at least one of the parties, and also suggesting the reasonableness of that interpretation since it has been accepted by others."[52] Here, there was no such prior interpretation or acceptance. From 1966 until 1980, Orkin [32] accepted the initially specified fee as the appropriate renewal payment. Even assuming that the pre-1975 customers had some common link for communicating with one another, as sales representatives of a particular company do, Orkin's customers had no fee increases to report.

Orkin also cites *Acheson v. Falstaff Brewing Corp.*, 523 F.2d 1327 (9th Cir. 1975), in which the court, in construing a collective bargaining agreement, took into account the language of the agreement, national labor policy "perceived and defined as a matter of federal law,"[53] and state law to the extent it was compatible with federal policies. The court also recognized the "fundamental rule of contract interpretation that great weight should be given the interpretation of the contract by parties thereto."[54] Orkin would have us give weight only to its own latter day interpretation of the pre-1975 contracts rather than the plain language of the instruments. We find Orkin's arguments concerning the circumstances of the situation or usage of trade unsupported by the factual or legal authority it cites.

Although Orkin attempts to suggest that the fee increase was justified because of escalating costs in the early

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52. *Id.* at 1150.

53. 523 F.2d at 1329.

54. *Id.* at 1330.

1970's, it has [33] not shown that it was losing money on the pre-1975 contracts.[55] We also note Orkin's objection to the conclusion of the Administrative Law Judge that it did not rely in good faith on the advice of counsel.[56] We do not address the question of good faith. Reliance by Orkin's officers or employees on legal advice is not germane to whether the company honored its contract obligations or acted unfairly toward its pre-1975 customers. [34] Such a rule would virtually eliminate a remedy for unfair acts or practices as long as an attorney recommended the conduct.[57]

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55. RAB at 7. We cannot accept the statement in finding 72 in the Initial Decision that Orkin experienced losses on its pre-1975 contracts. Viewing the evidence most favorably to the respondent, we agree that the cost of providing termite renewal services in 1984 exceeded the amount of renewal fees due on the pre-1975 contracts. Orkin presented no evidence, however, showing that it lost money on any single pre-1975 contract or on those contracts as a group if the initial treatment fee is included in the analysis. The initial treatment fee and the renewal premiums should be considered together in ascertaining how much money has been made or lost on an individual contract on a given date. *See, e.g.*, RAB 40, n.21; RPF 93. What Orkin has shown is its general concern about inflation, not its losses on the pre-1975 contracts. In any event, neither inflationary pressures nor demonstrated losses on binding contracts justifies unilateral disregard of the terms of the contracts. Despite its concern with inflation, Orkin showed yearly profits between 1977 and 1984:

June 1977 - $22,428,534

June 1978 - $19,258,821

June 1979 - $17,140,842

June 1980 - $23,744,000 (rounded to thousands)

June 1981 - $27,142,000 (rounded to thousands)

June 1982 - Not in record

June 1983 - $30,127,691

June 1984 - $31,548.071

IDF 6.

56. RAB at 11 n.7.

57. *See Gregg v. Chauffeurs, Teamsters and Helpers Local 150*, 699 F.2d 1015, 1017 (9th Cir. 1983).

Orkin has attempted to demonstrate that setting a fixed fee would not have been prudent,[58] that its fee increase was warranted because of inflation,[59] that it was a common practice in the industry to raise fees under these circumstances[60] and that consumers did not consider the question of fee increases important.[61] The material on which Orkin would have the Commission rely is irrelevant because it relates solely to intent not demonstrated to the customer, speculative because it consists of Orkin's unsupported beliefs and assumptions concerning general customer attitudes and expectations, or immaterial because, even assuming its truth and validity, it does not show that the contract permitted a unilateral fee increase.[62] Orkin has presented nothing concrete to suggest the existence of any genuine issue of material fact that would require development at trial. As the Court of Appeals for the First Circuit has said, "[W]hile a [party opposing summary judgment] is entitled to all [35] favorable inferences, he is not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture."[63]

In considering the merits of a motion for summary decision, the Commission must draw all factual inferences

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58. RAB at 26.

59. RAB at 18.

60. *Id.* at 25.

61. *Id.* at 27.

62. *See* note 48 *supra.*

63. *Manganaro v. Delaval Separator Co.*, 309 F.2d 389, 393 (1st Cir. 1962). *See also, e.g., Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986) ("opponent must do more than simply show that there is some metaphysical doubt as to the material facts"); *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986); *Exxon Corp. v. FTC*, 663 F.2d 120, 126-27 (D.C. Cir. 1980); *Marks v. United States Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978).

against the moving party. Here no factual inferences were necessary.

> [I]n actions involving written contracts the parol evidence rule may so operate that there is no relevant factual issue in dispute, so that summary judgment may be rendered . . . under applicable principles of contract law."[64]

The Commission has interpreted the pre-1975 contracts through a reading of undisputed contract language with reference to applicable principles of contract law. We conclude, as did Judge Barnes, that the "only logical interpretation of the Orkin 'pre-1975' contracts is that the company has contracted to provide lifetime protection for treated premises for a fixed annual renewal fee."[65]

III. SCOPE OF SECTION 5

Section 5 declares unlawful "unfair or deceptive acts or practices in or affecting commerce." Orkin contends that a [36] breach of contract not alleged to be deceptive may not constitute an unfair act or practice in or affecting commerce. We conclude that it may.

Plainly, a breach of contract or a systematic program to breach numerous contracts constitutes an "act or practice" under Section 5. The remaining question is whether

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64. Moore & Wicker, ¶56.17[11] at 56-785.

65. I.D. at 59-60. *See State ex rel. Guste v. Orkin Exterminating Co.*, No. 83-2166 (Dist. Ct. La., Orleans Parish, Feb. 25, 1986) (holding Orkin liable for breach of its pre-1975 contracts based on the fee increase, having found that the lifetime term of the guarantee and its fixed renewal premium were definite and enforceable).

such an act or practice is unfair.[66] Congress left to the Commission the responsibility to determine what particular acts and practices are unfair within the meaning of the statute and provided no exceptions for conduct related to contractual obligations. As we will discuss in Section IV, the Commission has determined that to be "unfair" under Section 5, an act or practice must result in substantial and unavoidable consumer injury that is not outweighed by benefits to consumers or to competition. Some consumer injury is inherent in any failure by a seller of goods or services to deliver according to the terms of a contract. The Commission will examine case by case whether the injury caused by a particular refusal to honor a contract obligation was avoidable, whether the injury is sufficiently substantial, either by its nature or its prevalence, to meet the Commission's [37] standard of "unfairness," and whether the injury is outweighed by benefits to consumers or to competition.

Orkin suggests that the Commission's interpretation of its unfairness jurisdiction should be guided by court decisions construing breach of contract under state "little FTC Acts," which, like Section 5, prohibit unfair acts or practices. The courts have read these state laws not to reach simple breach of contract. The Commission

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66. The Commission has previously found liability under Section 5 on an unfairness theory for conduct inconsistent with the contractual obligations of various respondents. *See, e.g., Jay Norris Corp.*, 91 F.T.C. 751, 848 (1978), *aff'd*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979) (retention of customer payments without performing the bargained for prompt delivery of merchandise); *Skylark Originals, Inc.*, 80 F.T.C. 337, 350-51 (1972), *aff'd*, 475 F.2d 1396 (3d Cir. 1973) (failure promptly to honor money-back guarantee as represented in advertisements and catalogs).

agreement. We conclude that no genuine issue of material fact exists concerning reliance on or bargaining for a fixed annual renewal fee. A principal reason [44] for using a standard form contract is to eliminate "bargaining" over terms in agreements intended for mass use. Standardization saves time and money and leaves the parties free to "focus on meaningful choice among a limited number of significant features,"[80] such as, in these contracts, the type of guarantee and the amount of the initial treatment and annual renewal fees.

We turn now to whether this substantial consumer injury is "harmful in its net effects."[81] As the Commission explained in *International Harvester,* conduct can create a mixture of both beneficial and adverse consequences.[82] Our task is to balance these consequences. Orkin did not purport to offer its customers anything new when it raised the annual renewal fees. The increase in the fee was not accompanied by an increase in the level of service provided or an enhancement of its quality. The action apparently was intended to enable the company to compensate for its rising costs, costs that Orkin claims it had not anticipated at the time it entered into the pre-1975 contracts.[83] By raising the fees, Orkin unilaterally shifted the risk of inflation that it had assumed under the pre-1975 contracts to its pre-1975 customers who lost the benefit of a fixed annual renewal fee. As Judge Barnes concluded, "[a]ll that [45] customers have received from

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80. Restatement § 211 comment a.

81. *International Harvester Co.*, 104 F.T.C. at 1061.

82. *Id.*

83. RAB at 6; RPF 14. As noted already (*see supra* note 54), Orkin has not shown actual losses on the pre-1975 contracts.

the increase in annual renewal fees is the additional burden of paying more for Orkin's services than they had originally agreed upon."[84]

Nor did raising the annual renewal fee for these consumers result in benefits to competition. Information concerning the availability, nature and prices of products and services plays an indispensable role in the allocation of resources in a free enterprise system.[85] In a competitive market, one may assume that consumers will choose the seller who offers the lowest price for a given level of quality. Normally, in such a market, the seller with the lowest price has the lowest cost per unit and is the most efficient. The market rewards the efficient seller to the ultimate benefit of consumers.

The market forces that reward efficient competitors would be impaired if a seller is allowed to gain a competitive edge by unilaterally changing the bargains it has made. Orkin's refusal to perform as promised under its contracts threatens the integrity of contracts and reduces the reliability of price information available to consumers in making their purchase decisions.

Orkin argues that these conclusions are erroneous and that an order precluding fee increases on the pre-1975 contracts and requiring a roll back of the fee increase already in effect would have adverse effects on its entire customer base and on many of [46] its competitors.[86] Orkin claims that such an order would impose the full burden of inflation on customers who entered into their

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84. I.D. at 75.

85. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1972).

86. RAB at 45.

contracts after February 1975. This argument does not change our view. Under the pre-1975 contracts, Orkin assumed the risk of inflation. Orkin reassigned the risk to the customer in the contracts it issued after February 1975 that expressly allowed fee increases not conditioned on structural modification of the treated premises. The post-1975, unlike the pre-1975, customer contracted for the risk.[87]

Orkin appears to make two arguments concerning harm to its competitors. First, the company argues that an adverse ruling would "jeopardize" past fee increases imposed by its competitors and could endanger their survival.[88] Second, as we understand it, Orkin argues that competition will suffer if the renewal fees on the pre-1975 contracts are returned to their initial level, because lower fees would discourage or prevent customers holding those contracts from transferring their business to the respondent's competitors.[89] We fail to see why either argument is relevant to whether Orkin's fee increase violates Section 5. [47] Orkin's competitors are not before us, and we neither know nor have reason to know the nature of their contractual obligations or the manner in which they have fulfilled them. Even assuming the validity of Orkin's factual assertions, any wrongdoing of other firms would

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87. It is less than clear that if compelled to roll back the fee increase on the pre-1975 contracts, Orkin would raise the fees on contracts entered into after February 1975. Presumably, the prices on those contracts were set to maximize profit and minimize the loss of customers to competing firms. In an industry that, as Orkin concedes, is fragmented and competitive, fee increases on the post-1975 contracts might be unprofitable, because they could drive away customers to firms selling at-competitive levels.

88. RAB at 47.

89. RAB at 47.

not excuse unlawful conduct by Orkin. The second argument is perhaps even less persuasive. Indeed, the argument implicitly concedes that the pre-1975 customers do in fact know and appreciate the benefit of their bargain with Orkin. A fee roll-back would simply restablish the original bargain. That competitors might thrive if a respondent is permitted to flout accepted standards of commerce is not a benefit to competition cognizable in an analysis of unfairness under Section 5. We conclude that the injury to consumers and to competition resulting from Orkin's increase of the annual renewal fees on its pre-1975 contracts is not outweighed by countervailing benefits.

The next question is whether Orkin's pre-1975 customers reasonably could have avoided the injury they suffered from the increase of their annual renewal fees "through the exercise of consumer choice."[90] Consumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential avenues toward that end. As the Commission said in *International Harvester*: [48]

> Whether some consequence is 'reasonably avoidable' depends not just on whether people know the physical steps to take in order to prevent it, but also on whether they understand the necessity of actually taking those steps.[91]

The Commission has determined that neither anticipatory avoidance nor subsequent mitigation was reasonably possible for Orkin's pre-1975 customers.

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90. *International Harvester Co.*, 104 F.T.C. at 1061.

91. *Id.* at 1066.

It cannot be argued seriously that consumers reasonably could have avoided the injury resulting from Orkin's renewal fee increase before it became effective. The pre-1975 contracts provided consumers no notice nor even a reason to suspect that the company might raise the annual renewal fee at will. The respondent used standard form contracts expressly permitting Orkin to increase the annual renewal fee only under specifically limited circumstances and stating clearly that only those terms contained in the contract were part of the agreement between the parties. Orkin's customers and, for that matter, its sales force were powerless to modify the form contract. Modifications could be made only by a corporate officer under the corporate seal.

Nor, generally, could consumers effectively have mitigated the damage they sustained from Orkin's action after the fact. Orkin did not notify its pre-1975 customers that it would consider exceptions to the fee increase. Orkin granted exceptions only to those customers who complained and demonstrated to Orkin's satisfaction that they had specifically relied on express claims that the annual renewal fee would be fixed for the lifetime of the treated structure. Orkin's [49] accommodation program was only a limited response to expressions of customer outrage. The program was not designed to accommodate all customers but rather to control any particularly strong adverse consumer reaction and to minimize any consequent loss of customers and good will. Indeed, it would have been pointless for Orkin to effectuate the fee increase and, simultaneously, to notify its customers that if they preferred not to pay the higher amount, they need not do so.

Orkin asserts that customers with pre-1975 contracts could have refused to pay the increased renewal fee and transferred their business to one of Orkin's competitors that would have assumed the obligations contained in the Orkin pre-1975 contracts for the original renewal fee price or "for less than the levels to which Orkin raised these fees in 1980."[92] The representations of Orkin's own President, Gary Rollins, belie the validity of this argument. Mr. Rollins testified that he "would doubt" that a competing company would do that for a customer.[93] The record evidence is not inconsistent. Even viewed in the light most favorable to Orkin, the evidence does not show that Orkin's competitors assumed or would have assumed the obligations of Orkin's pre-1975 contracts without imposing conditions that would have resulted in additional costs to Orkin's customers,[94] nor does it show that they would not subsequently have increased their annual fees. The competitors' contracts that Orkin has [50] presented all provide for increasing the annual renewal fee after a period of time ranging from four to six years.[95] None of the competitors says, and we see no reason to suppose, that he would grant more favorable treatment to customers who previously had contracted with Orkin than to his other customers who had not.

Even if customers could transfer their contract to another firm, that might not be satisfactory. Orkin represents that it is the "world's largest termite and pest

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92. RAB at 44.

93. Rollins Dep. at 210; IDF 71.

94. *See supra*, pages 11-12 and note 7.

95. Hromada Aff., Exs. A and B.

control company"[96] and that customers "generally contacted Orkin because of its reputation, stature in the industry, and length of time in business."[97] These claims are borne out by several of the consumer affidavits presented by Orkin.[98] The assertion that customers could have mitigated the injury they sustained from the respondent's fee increase by switching to a competing firm does not account for the harm inherent in compelling those customers to deal with a smaller company of lesser stature and repute than Orkin. Nor does it account for the transaction costs to customers faced with the need to search for a reliable or reputable firm willing to provide the same services on the same terms as those in Orkin's pre-1975 contracts and to complete a new agreement with that firm. The Supreme Court noted long ago [51] that "the public is entitled to get what it chooses,"[99] a principle that applies to services as well as goods. The Court has said:

> If consumers . . . prefer to purchase a given article because it was made by a particular manufacturer . . ., they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good but having a different origin.[100]

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96. IDF 4 and citations to record therein.

97. RAB at 39; *see also* RAB at 5 RPF 6, 92; Raymond Dep. at 150; Tindol Aff. ¶4; IDF 11; IDF 32-33 (promotional language stressing advantages of doing business with Orkin).

98. *See, e.g.*, Adams Aff. ¶4; Albertson Aff. ¶4.

99. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

100. *FTC v. Royal Milling Co.*, 288 U.S. 212, 217 (1933); *accord, Pep Boys—Manny, Moe & Jack, Inc. v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941).

The Commission finds that the respondent's pre-1975 customers could not reasonably have avoided or mitigated the injury that they sustained as a result of Orkin's increase of their annual renewal fee, and it concludes that the respondent's increase of the annual renewal fee on its pre-1975 contracts constituted an unfair act or practice in violation of Section 5.

THE ORDER

We have concluded that Orkin's actions to increase the renewal fees in its pre-1975 contracts constitute unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, and we hereby enter an order to prevent the recurrence of the violation. As required, the order is reasonably related to the violation found to exist.[101] [52]

The order in this case requires Orkin to cease and desist from the acts and practices described above. This requirement results in a roll back, as of the effective date of the order, of the annual renewal fees on all of Orkin's pre-1975 contracts. Under the order, Orkin may seek modification or novation of its pre-1975 contracts, but only after a two-year moratorium on any such efforts. The order also requires Orkin to send a letter notifying all its customers holding currently effective pre-1975 contracts of the Commission's order and of the roll back of their annual renewal fees.

I. ROUTINE PROVISIONS

Several sections of the order require little explanation or discussion. The introductory portion of the order

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101. *See, e.g., FTC v. National Lead Co.*, 352 U.S. 419 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946).

contains definitions, and Parts III-VI contain routine provisions mandating distribution of the order throughout Orkin's corporate structure, the filing of initial and supplemental compliance reports and notification of the Commission of any changes in that corporate structure. Parts I and II detail more substantive obligations.

II. ROLL BACK OF ANNUAL RENEWAL FEE

Part I of the order requires Orkin to cease and desist from the acts and practices the Commission has found unlawful and requires that, as of the effective date of the order, the company roll back the annual renewal fee on the pre-1975 contracts to their level prior to the 1980 fee increase. Orkin contends that an order should require a fee roll back, if at all, only with respect to pre-1975 customers who believed in good faith that their annual fee could not be increased under their contracts. [53] Like its argument on the merits, Orkin's position here is simply an attempt to impose on its customers the burden of demonstrating that the company's imposition of higher fees resulted in consumer injury. Such a demonstration is not required. A judgment that consumers sustained injury as a result of Orkin's fee increase is inherent in the Commission's conclusion that the fee increase constituted an unfair act or practice under Section 5.[102]

Orkin's suggestion that any roll back in the order be limited to pre-1975 contracts where there was a "meeting of the minds" on a fixed annual renewal rate is just another way of arguing that only customers who "believed in good faith" that the fee was fixed should be afforded a roll

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102. *See* pp. 37-51, *supra*, for further discussion of consumer injury in this matter.

back. As explained earlier,[103] in the context of an integrated, standard form contract drafted by the company, customers are entitled to performance of all aspects of the agreement. We do not accept Orkin's position that some of the obligations in the agreement were expendable.

III. NOTICE LETTER

Under Part II of the order, Orkin must notify each of its customers holding currently effective pre-1975 contracts of the roll back of the 1980 fee increase, except those pre-1975 customers whose fee increases have already been rolled back. The Commission has modified the language of the notice letter and finds Orkin's proposed alternative letter and questionnaire [54] inappropriate. The questionnaire is particularly objectionable because it would permit the company once more to make the pre-1975 customers "prove" that they were injured by the unilateral fee increase that we have determined constituted an unfair practice under Section 5.

IV. MORATORIUM ON NOVATIONS AND PRIOR COMMISSION APPROVAL

The *proviso* clauses following Part I-E of the order permit Orkin to seek modification or novation of its pre-1975 contracts, but the company may initiate no such attempt until any customer from whom such a modification or novation is to be sought has made at least two annual payments at the annual fee specified in the pre-1975 contract or guarantee. The Administrative Law Judge's order specified, in addition, that the respondent would be required to obtain prior Commission approval

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103. *Supra* at pp. 40-41 and 50.

of "each and every document or representation which respondent may use or make in any attempt to seek a modification or novation."

We are not persuaded by Orkin that a two-payment moratorium is unduly burdensome, and we believe that it adds a needed measure of stability for the affected consumers that will reduce the likelihood of confusion when, and if, Orkin seeks to modify the contracts. On the other hand, we have decided that, in light of the other restrictions in the order, we need not include the requirement for prior Commission approval of documents Orkin might use in seeking to modify the contracts. Such a provision could impose an unnecessary restriction on the company and places an unwarranted administrative burden on the Commission's time and resources. [55]

Instead of including this requirement, we order the respondent to include in the compliance reports required under Part V of the order documents showing all representations made (whether oral or written) in any attempt to seek modification or novation during the period covered by the report. We also order the respondent to include in the compliance reports copies of contracts that have been modified or subjected to novation as a result of its efforts. The order also requires Orkin to include in its compliance reports the names and addresses of any holder of a pre-1975 contract or guarantee with whom it has communicated concerning modification or novation during the period covered by the report. With the inclusion of these materials, we believe that the compliance reports will provide a sufficient basis on which to monitor effectively the company's compliance with the order without the need to burden either the company or the agency with a prior approval provision.

V. CONSUMER REDRESS AND REINSTATEMENT OF CANCELLED CONTRACTS

Notwithstanding its order of November 13, 1985, directing the parties to brief the question whether consumer redress should be ordered in this case if the respondent were found liable under Section 5 and the briefs filed pursuant to that order, the Commission has decided not to address that issue in this proceeding.

The Commission also declines to impose the additional relief sought by complaint counsel that would require Orkin to offer to reinstate the contracts of all the pre-1975 customers who have cancelled their contracts since the 1980 fee increase or at least [56] those customers who cancelled during the first year after the increase. Complaint counsel suggest that the failure to include a requirement that Orkin offer to reinstate the contracts of pre-1975 customers who cancelled after the fee increase may have adverse implications.[104] This may be true, and, had this matter gone to trial, we might have imposed the relief that they request. We are not persuaded, however, that the evidence in the summary decision record warrants imposing on Orkin the burden of offering to reinstate contracts cancelled after August, 1980, that may or may not have been cancelled as a result of the fee increase. Although the Commission could remand the matter to the Administrative Law Judge

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104. CAB at 19-23. Complaint counsel's supplemental brief argues that our order should not include refunds to consumers who actually paid the increased renewal charges—arguably a less costly and more readily administrable form of relief than reinstatement of customers whose contracts are no longer in force. We find it unnecessary to attempt to reconcile the apparent inconsistency of these positions.

for trial on this limited issue, we have decided that a remand would not serve the public interest at this time.

CONCLUSION

In addition to the factual findings embodied in this decision, the Commission adopts the findings of fact included in the Initial Decision except to the extent that they are inconsistent with this opinion. On the basis of these facts, for the reasons given above, and for the reasons provided by the Administrative Law Judge to the extent they are not inconsistent with this decision, the Commission has determined that Orkin's [57] raising of the annual renewal fees on its pre-1975 termite contracts constitutes an unfair act or practice prohibited by Section 5 of the Federal Trade Commission Act. The Commission issues an order including portions of the order contained in the Initial Decision, imposing certain additional requirements and modifying others.

SEPARATE STATEMENT OF CHAIRMAN DANIEL OLIVER

I concur in the majority's conclusion that respondent Orkin Exterminating engaged in an unfair practice when it unilaterally raised the contracted-for annual renewal fees in its pre-1975 contracts. I differ from the majority, however, in the application of the Commission's unfairness standard to the facts of this case. I write separately to explain: first, why I believe careful application of the unfairness standards is important; second, the circumstances that warrant the Commission's intervention in such disputes; and third, the way in which I would apply that analysis to the case before us.

I. GUIDANCE OF COMMISSION OPINIONS

The Commission's written opinions do more than reflect the outcome of a particular matter. They should help in the development of workable rules and provide guidance that both explains and demonstrates the reach of the legal principles involved. The Commission's analysis is particularly important in unfairness cases because of the broad ambit of Section 5. It was criticism of the Commission's broad discretion to define practices as legally "unfair" that led to adoption of the Policy Statement on Unfairness in 1980. In that statement, the Commission promised to "construe its jurisdiction in limited, specific, and market-oriented terms" and to define it "with [2] sufficient particularity to answer criticisms that the law is excessively uncertain."[1]

There are a variety of reasons underlying the Commission's desire, and need, to provide as careful an explanation as possible for its conclusions in an unfairness case. First, our opinions provide direction within the Commission. They are the records available for future Commissioners to ascertain why we acted or failed to act under particular circumstances. In addition, they provide counsel to the Commission staff in its case selection criteria and can thus affect the analysis employed in many other circumstances. Application of careful reasoning also aids the Commissioners in ensuring that we exercise our discretion carefully.

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1. *Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction*, letter from the FTC to Senators Ford and Danforth, December 17, 1980 ("Unfairness Statement") at 11. Reprinted at Trade Reg. Rep. (CCH, Transfer Binder, Current Comment 1969-1983 Par. 50,421 at 55,948).

Second, the patent limitations on the Commission's ability to detect all law violations suggests that a principal benefit to be gained from a litigated Commission decision is the assistance it provides to businesses attempting to comply with the law. Reliance on the "Commission's discretion not to bring cases that would be unreasonably burdensome . . . gives no comfort to the seller who is endeavoring to comply with the law, since he cannot tell how the Commission will exercise its discretion . . ." [3] *International Harvester Co.*, 104 F.T.C. 949, 1060 n.40 (1984). If we do not explicate carefully the rationale in a given case, we either forfeit the possibility of providing useful guidance for business or encourage excessive precaution. In both instances consumers ultimately bear the costs.

Third, the states, almost all of which have their own "Little FTC Acts," look to Commission decisions for guidance interpreting those Acts. Several of these statutes specifically incorporate the Commission's case law.[2] With a large number of states there is, of course, potential for great diversity in applying the law. This could be exacerbated if the courts reach inconsistent results on similar facts. Again, such a result is unlikely to aid consumers and should be avoided, if possible, by careful action on the Commission's part.

This problem is compounded by the fact that many states provide private rights of action and frequently al-

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2. *See, e.g.*, Mass. Gen. Laws Ann. ch. 93A, Section 2(b) ("It is the intent of the legislature that . . . the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act . . . .")

low treble damages as a remedy in such private disputes.[3] State courts have repeatedly struggled with litigants' attempts to use those [4] statutes to provide increased damage awards for contract breaches. It is apparent from a review of such cases that the courts have had difficulty distinguishing unfairness cases from breach of contract actions. At times they have resorted to a "bad faith" standard, or have sought other methods of providing some distinguishing features in order to prevent these state statutes from swallowing the common law.[4] To the extent that the Commission can clearly articulate its rationale for reaching a result it can also aid these courts in interpreting their own state statutes.

II. BOUNDARIES OF THE UNFAIRNESS JURISDICTION

Given the enormous number of private contracts operative in the economy that are negotiated, performed, or breached without the involvement of the government

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3. *See, e.g.*, Mass. Gen. Laws Ann. ch. 93A, Section 11 (providing private rights of action and treble damages); N.C. Gen. Stat. Section 75-16 (same).

4. *See Marshall v. Miller*, 276 S.E.2d 397, 401 (N.C. 1981), where the Court "expressly overrules" "any possible implication" that "a party must show bad faith in order to recover treble damages" for violation of the State little FTC Act. The same case also rejected the lower court's determination that intentional wrongdoing had to be established. *Id.* at 402. Similarly in *United Roasters v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981), the Court recognized that in interpreting the North Carolina statute the state courts had not limited it to cases where there was injury to consumers. *Id.* at 991, but concluded that the statutory terms "must mean something more than an ordinary contract breach." *Id.* at 992. *See also Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc.*, 754 F.2d 10, 17-19 (1st Cir. 1985), where the court upheld a treble damage award under the Massachusetts little FTC Act because of a "calculated refusal to pay a clearly owed indebtedness" in a dispute between two businesses, finding the actions a "wilful violation."

willing to avail themselves of their private remedies because the individual losses are so small.[7] When that is the case the normal incentives provided by the common law of contracts do not operate in the same fashion that they would in most instances.

The common law provides a framework within which parties can structure private agreements. Contracts are entered against the background of the existing rules that define obligations and remedies. The common law generally does not require that parties perform under their agreements. To cite Judge Posner: "it is not the policy of the law to compel adherence to contracts but only to require each party to choose between performing in [8] accordance with the contract and compensating the other party for any injury resulting from a failure to perform." R. Posner, *Economic Analysis of Law* 88 (2d ed. 1977) (hereinafter Posner).[8] The knowledge that the alternative to performance is compensation provides an incentive not to breach except in situations when the party breaching a contract is better off after paying damages to the other party.

If compensation for breach can be avoided, however, there is a breakdown in the normal incentive systems created by the common law of contracts. This not only encourages inefficient breaches, but also alters the underlying agreement by shifting costs or risks from the party

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7. I am not suggesting that this is the only market failure that could justify an unfairness action when a breach of contract is involved.

8. The Restatement (Second) of Contracts also reflects this policy. "The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach." Introductory Note, Chapter 16, at 100.

who voluntarily assumed them to the other, nonbreaching party. As explained more fully below, then, an unfairness analysis of this record reveals a situation different from the "mere breach of contract" that Orkin posits.

This analysis is hardly unprecedented. It explains many previous Commission decisions. Common law causes of action would have been available in many other Commission cases. But Commission intervention was appropriate because those actions were unlikely to supply an effective remedy. The Supreme Court recognized this early in the Commission's history, when the Court [9] found that something more than a mere private dispute was needed to justify an action "in the public interest." *FTC v. Klesner*, 280 U.S. 19, 28 (1929). In a decision written by Justice Brandeis, one of the key actors in the Commission's creation,[9] the Court noted that it may be in the public interest to bring an action "because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it." *Id.* In my view, the Commission's decision in this matter must rest on precisely this basis.

III. APPLICATION OF UNFAIRNESS TO THE FACTS OF THIS CASE

The focus of the Commission's unfairness analysis is consumer injury. In considering whether conduct is

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9. *See Exposition Press, Inc. v. FTC*, 295 F.2d 869, 877 (2d Cir. 1961), Friendly, J., dissenting. ("It is deeply significant that the Klesner opinion was written by Mr. Justice Brandeis. For 'he, more than any other man, was the begetter' of the Federal Trade Commission.")

unlawful as an unfair act or practice, the Commission determines whether that injury is: (1) substantial; (2) not outweighed by any offsetting consumer or competitive benefits that the practice produces; and (3) one which consumers could not reasonably have avoided. *International Harvester Co.*, 104 F.T.C. 949, 1061 (1984). [10]

A. *Substantial Injury*

The injury to consumers resulting from Orkin's breach of some 207,000 pre-1975 contracts resulted in actual and substantial consumer injury. The harm resulting from Orkin's conduct consists of increased costs for services previously bargained for, and would be equivalent to the contract damages to which consumers would be entitled.

The Commission's requirement that consumer injury be substantial rests in part on the practical difficulties that would ensue if the Commission were to bring cases based on trivial or speculative harm. Without this anchor the Commission would be able to determine that any injury, such as an offense to the good taste of an audience for an advertisement, was actionable. It would be possible to develop many theories of consumer injury that were intangible or wholly subjective, or that would be based simply on the personal perceptions of a majority of the five Commissioners.

Moreover, the requirement that consumer injury be substantial makes good practical sense because it is one component of the cost/benefit analysis upon which the Commission's unfairness jurisdiction is based. In some cases the Commission must, of course, make its best estimate of likely [11] consumer injury. The Commis-

sion's deception cases, a subset of unfairness, provide a ready example.

In this case, however, a large part of the consumer injury is complete and readily quantifiable, and I agree with the majority's conclusion that it is substantial. Consumer injury consists of the increased fees they are subject to because of Orkin's breach. They have paid at least $7.5 million in increased renewal fees as a result of Orkin's fee increase.

B. *The Injury Is Not Outweighed by Countervailing Benefits*

The next step in analyzing this case is to determine whether the consumer injury is outweighed by any countervailing benefits to consumers or competition. On the facts of this case, I can see nothing that consumers gained from Orkin's breach of these contracts. Similarly, Orkin's contentions that its actions benefited its competitors, and thus competition, is unpersuasive. Simply put, Orkin drafted contracts assigning to itself the risk of inflation. It later sought to impose that risk on consumers. There is nothing in the record indicating the presence of any offsetting benefits from that action. [12]

C. *The Injury Was Not Reasonably Avoidable by Consumers*

The next element of the unfairness analysis is inquiring whether the injury could be reasonably avoided by consumers. If consumers can choose among competitors or are otherwise able to protect themselves it is not the Commission's role to second-guess the wisdom of their de-

cisions. A central focus of determining whether the injury was reasonably avoidable, therefore, is ascertaining whether there is some impediment preventing consumers from protecting themselves—whether there is a "market failure."[10]

The issue in this case, therefore, is whether there were any steps that consumers could reasonably have taken to avoid the injury stemming from Orkin's breach of contract. Thus it is necessary to inquire whether consumers could have acted before entering these contracts, whether they could have avoided the injury after breach by mitigating their damages, and whether they could have reasonably pursued legal action for compensation. [13]

1. Avoidance Prior to Contracting

The first question is whether Orkin's pre-1975 customers reasonably could have avoided the injury they suffered from the increase of their annual renewal fees at the time of contracting. There is nothing in the record indicating that consumers could or should have known that Orkin would unilaterally raise its annual renewal fee. Moreover, the contracts themselves are quite explicit in providing a fixed annual fee. As a result, there was no reason for these consumers to anticipate Orkin's actions and they could thus not have avoided them prior to entering the contracts.

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10. As the Commission stated in its discussion of this element in its Policy Statement: "Normally we expect the market place to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory." Policy Statement at 7.

2. Avoidance Through Mitigation

Similarly, mitigation was not a reasonable alternative for consumers to have pursued in this case. Neither the Orkin accommodation program nor the possibility of attempting to get one of Orkin's competitors to assume these contracts provided an effective avenue for avoiding injury.

Orkin asserts that customers with pre-1975 contracts could have simply transferred their business to one of Orkin's competitors, and that those competitors would have assumed the obligations contained in these Orkin contracts for either the original renewal fee or for less than the amount that Orkin [14] increased them to. To the extent that this was a possibility for Orkin customers, however, there is at a minimum injury resulting from the transaction costs expended by Orkin consumers in locating another company and entering a new contract.[11]

Moreover, even granting Orkin all reasonable inferences it has not raised genuine issues of material fact necessitating trial on this issue. The affidavits of Orkin's competitors state that they have assumed Orkin contracts at the same annual renewal fee promised by Orkin.[12] However, none of the competitors identified in these affidavits state that they had a fixed renewal fee that did not go up. As a result, consumers who went elsewhere were still subject to the risk of inflation. It was that risk that Orkin agreed to assume in these contracts.

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11. It is possible that the most effective means of mitigation under the circumstances was to pay the increased fees subject to later legal action for damages. *See* Restatement (Second) of Contracts § 350, comment e, at 130 ("If the party in breach offers to perform the contract for a different price, this may amount to a suitable alternative").

12. *See* affidavits of Hromada (Terminix), Murphy (Radar) and Tindol (TNA).

(excepting the courts, on [5] occasion) it seems to me apparent that regulation of the great majority of these private agreements was never intended to fall within the jurisdiction of the Federal Trade Commission. However, I have concerns that the majority opinion does not provide readily apparent standards that explain why our jurisdiction is properly invoked in this case. It may prove helpful to explain the rationale and analysis that I believe underlie the Commission's determination that the actions of Orkin in breaching the contracts at issue here constitutes an unfair act or practice.

The analytic tool the Commission has applied to circumscribe its unfairness authority is the tripartite test laid out in the Commission's Policy Statement on Unfairness. The focus of this test is consumer injury. Determination of whether that injury is "unfair" as a legal matter requires consideration not only of the quantum of injury, and any countervailing benefits that the practice produces, but also of the economic forces at work. The Commission's Policy Statement on Unfairness incorporates this economic inquiry of market failures in its discussion of whether injury is reasonably avoidable, stating that:

> Normally we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing [6] decisions without regulatory intervention—to govern the market.[5]

Put differently, "In making this determination [that a practice is unfair], the FTC and the courts should examine whether any market failure justifying government inter-

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5. Statement on Unfairness, *supra*, at 7.

vention actually exists; what economic justifications, if any, support the practice; what costs would result from FTC intervention; and finally, whether the remedy is likely to be cost effective or efficient." Gellhorn, *Trading Stamps*, S&H, *and the FTC's Unfairness Doctrine*, 1983 Duke L.J. 903, 955 (1983).

I have no difficulty agreeing with Orkin's proposition that a breach of contract, without more, does not violate Section 5. It is normally not our role to become involved in breaches of contract because private enforcement of private agreements is generally more efficient than governmental intervention. The appropriate question, however, is whether other circumstances apart from simple breach of contract bring this case within the Commission's unfairness jurisdiction.[6] In other words, is there a market failure present in this case? [7]

The only market failure that I perceive on the record presented here is the fact that private actions for damages were not likely to be effective. The Unfairness Statement itself recognizes that in those circumstances injury may not be reasonably avoidable by consumers. "In some senses any injury can be avoided—for example, by hiring independent experts to test all products in advance, or by private legal actions for damages—but these courses may be too expensive to be practicable for individual consumers to pursue." Unfairness Statement, n.19 at 7. In this case some, perhaps many, Orkin customers were unable or un-

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6. Orkin is correct that many of the Commission's past cases involved some defect in the information available to parties when entering contracts, either through misrepresentation, duress, coercion, or the like. *See* Unfairness Statement at 7; Craswell, *The Identification of Unfair Acts and Practices By the Federal Trade Commission*, 1981 Wisc. L. Rev. 107. This does not mean, however, that the Commission's role is limited to those situations.

Moreover, there was more to these contracts than the cost of the annual renewal fee, and the affidavits offered by Orkin do not indicate that the competitor's services were comparable to Orkin's. There is no indication, for example, that treatments used by other companies were as effective as those of Orkin. This matters because the annual inspections that were performed [15] after the annual renewal fee was paid also included any necessary retreatment.

Complaint counsel has demonstrated that Orkin's breach deprived consumers of the benefits from a fixed annual renewal fee. Orkin has provided no indication that consumers had any alternative means of obtaining that feature, and has thus failed to raise a genuine issue of material fact on this point.

3. Avoidance Through Legal Action

There is no allegation that Orkin intended anything other than performance when it offered a fixed annual renewal fee. It is efficient for parties to be able to plan for future events and contingencies by entering contracts for performance at a subsequent time. Such agreements are only practical, of course, when they can be enforced.[13] The enforcement mechanism for breach of contract has been developed through the common law. The rules de-

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13. Without some enforcement mechanism for contractual relations, parties would have difficulty determining in advance which companies would abide by those agreements. If consumers have no assurance that the other party will either perform, or provide the monetary equivalent of performance, they would be unable to make rational decisions about which party to contract with. In this case, for example, consumers might well have chosen to deal with a different company had they known that Orkin would subsequently repudiate a material term of these contracts.

veloped through the judicial system provide a framework for private agreements, and in most cases provide the [16] appropriate incentives for parties to either perform or breach and pay damages.[14]

With a large number of small contracts, however, the cost of litigating an individual loss may be greater than the expected individual recovery. In such situations the market may not provide an adequate disincentive for contract breach. Thus, the question for purposes of this element of the unfairness test is whether actions for contract damages are an economically feasible method of damage avoidance.

This type of market failure underlies many of the Commission's enforcement initiatives. In deception cases common law rights of action are frequently available to consumers, but the individual damages are normally too small to justify the necessary litigation. Similarly, the Commission's Mail Order [17] Rule[15] tends to encourage compliance with what are fundamentally contract rights.

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14. It is not necessary that parties always perform. In fact, it is sometimes more efficient for parties to breach if it costs less to compensate the other party than it does to perform. An example may help illustrate the point. The Arctic Earmuff Company contracts to sell 1000 earmuffs to the Boston Earmuff Emporium for $.50 a pair. The Boston Emporium plans to resell them for $1.00 a pair. Unfortunately, AEC has old machinery that breaks down and is irreparable. If AEC must perform, it would be required to obtain new machinery at substantial cost. The Arctic Earmuff Company might prefer to pay damages and not buy more machinery, and exit this declining industry. The Boston Emporium would probably be just as happy with the lost profits ($.50 x 1000 = $500). If so, it is indifferent between performance and breach. Requiring Arctic to perform could result in a substantial societal loss if it could not recover the costs for new machinery from other business.

15. 16 C.F.R. Part 435 (1986). CCH para. 38,040. This is made explicit in the Statement of Basis and Purpose of the Rule,

(Continued on following page)

When these principles are applied to the instant case it becomes readily apparent that this is more than a simple breach of contract, and that Orkin's actions in unilaterally raising the annual renewal fees in these contracts is an unfair act within the meaning of Section 5. Individual private actions for damages would not have been effective in this case, given the small dollar amount of the increase in the annual renewal fee charged to each consumer.[16] Moreover, class actions are often not effective vehicles for obtaining relief.[17] In addition, of [18] course, it is unlikely that Orkin customers realized that they were being deprived of a legally enforceable right.

I therefore conclude that the respondent's pre-1975 customers could not reasonably have avoided or mitigated

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Footnote continued—

40 FR 51582, 51585 (1975). "The high costs of going to court as well as jurisdictional limitations prevent consumers from seeking remedial legal action. 'From the consumer's point of view . . . in many cases the amount of money involved is significant, but not enough to make it worthwhile to the consumer to force the seller to fill the order, or to try to recover his money through the use of legal remedies. In these situations, the individual is simply at the mercy of the mail-order merchandiser'." *Id.* at 37.

16. Even where private actions are brought under state Little FTC Acts for breaches of contract like the present one this market failure may still be involved. Consumers in situations like the current one might well contend that the problem was that the company breached the contracts in circumstances where they knew or should have known that individual breach of contract actions were not likely.

17. "The class action remains . . . a very troublesome procedure." F. James & G. Hazard, *Civil Procedure* § 10.18 at 507 (2d ed. 1977). *See* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv.L.Rev. 661, 667-68 (1977) ("consumer class suits often are impossible to bring because of decisions in the federal system making it impossible to aggregate separate claims in order to satisfy the $10,000 jurisdictional amount and because of the impracticality in many states of maintaining a class action.")

the injury that they sustained as a result of Orkin's increase of their annual renewal fee. I conclude that the respondent's increase of the annual renewal fees on its pre-1975 contracts constituted an unfair act or practice in violation of Section 5, and I concur in entry of the order[18] proposed by the majority.

CONCURRING STATEMENT OF COMMISSIONERS TERRY CALVANI AND ANDREW STRENIO, JR.

The Commission today has determined that Orkin has been acting in violation of Section 5 of the Federal Trade Commission Act by unilaterally changing the terms of agreements with some 200,000 customers. These violations have increased Orkin's revenues by over $7.5 million thus far. While the Commission declares Orkin's acts to be unfair, its order allows Orkin to retain the money. We concur in the Commission's decision but do not think that it goes

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18. The final order requires Orkin to roll back the contract price to its consumers with the Pre-1975 contracts, and wait at least two years before seeking modifications of the contracts. This is, in essence, a requirement of specific performance. As such, it raises the usual issues that courts have considered regarding whether that remedy is appropriate. In such orders the courts—and in this case the Commission—confront the difficulty of determining whether firms subject to specific performance mandates are living up to all the terms of their agreements. As a general matter, I believe that the Commission should avoid placing itself in such situations.

Possibly the most effective remedy that could be provided in this matter would be monetary compensation for the consumers involved. Specific performance is normally granted only when the remedies at law are inadequate. Although I understand the desire of Commissioners Calvani and Strenio to require Orkin to pay damages in this proceeding I do not share their confidence that such a remedy is available in the Commission's enforcement arsenal. Given those circumstances, I support entry of the final order included in the majority opinion.

far enough. Restitution is appropriate here.[1] Indeed, restitution may be the only effective remedy.[2] We would have ordered Orkin to refund its ill-gotten gains.

FINAL ORDER

This matter has been heard by the Commission upon the appeals of the respondent, Orkin Exterminating Company, Inc. ("Orkin"), and complaint counsel from the initial decision, and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying opinion, the Commission has determined to deny the appeals of both Orkin and complaint counsel and to affirm the initial decision of the administrative law judge. Accordingly,

It is ordered, That the findings of fact and initial decision of the Administrative Law Judge be adopted insofar as they are not inconsistent with the findings of fact and conlusions of law contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and the same hereby is, entered:

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1. The Commission has long held that it has the power to order restitutionary relief. *MacMillan, Inc. et al.*, 96 F.T.C. 208 (1980); *Raymond Lee Organization*, 98 F.T.C. 481 (1978); *Credit Card Service Corp.*, 191 (1973); *Curtis Publishing Co.*, 78 F.T.C. 1472 (1971). *But see Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974). *Accord, Barrett Carpet Mills, Inc. v. CPSC*, 635 F.2d 299, 301 (4th Cir. 1980); *Congoleum Indus. Inc. v. CPSC*, 602 F.2d 220 (9th Cir. 1979). (However, the Commission has consistently asserted its disagreement with *Heater*. *See, e.g., Francis Ford, Inc.*, 94 F.T.C. 564, 622-23 (1979), *rev'd sub nom. Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982); *Genesco, Inc.*, 89 F.T.C. 451, 478 (1977); *Electronic Computer Programming Institute*, 86 F.T.C. 1093, 1095 (1975)).

2. *Credit Card Service Corp.*, 82 F.T.C. 207 (1973).

The following definitions shall apply in this order:

A. *Customer* means any consumer or business owning or holding a pre-1975 contract or guarantee, as defined below, entered into or issued by Orkin and any successor in interest to such a consumer or business.

B. *Contract* means any agreement entered into by Orkin to supply services to control termites, wood-infesting organisms, moisture, or wood decay. [2]

C. *Guarantee* means any guarantee extended by Orkin in connection with a contract.

D. *Pre-1975 contract* means any currently effective contract entered into by Orkin during the period from January, 1966, to February, 1975, that includes the term "lifetime" and that does not provide for adjustments to or increases of the annual fee except and unless the treated premises are structurally modified, altered or otherwise changed after the date of initial treatment.

E. *Pre-1975 guarantee* means any guarantee extended by Orkin in connection with a pre-1975 contract.

I.

It is further ordered, That Orkin, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any product or service to protect a house, building or other structure from termites, wood-infesting organisms, moisture, or wood decay, shall forthwith cease and desist from:

A. Charging, requesting, collecting or accepting under any pre-1975 contract or pre-1975 guarantee any annual renewal fee that is greater than the fee specified therein except in accordance with any clause in that contract or guarantee that applies if the treated premises have been structurally modified, altered or otherwise changed after the date of initial treatment.

B. Refusing to accept the amount of the annual fee stated in the pre-1975 contract or pre-1975 guarantee as payment in full for renewing a pre-1975 guarantee.

C. Refusing to perform the services specified in any pre-1975 contract or guarantee upon timely tender of the annual fee stated therein.

D. Charging, requesting, collecting or accepting under any contract or guarantee any annual fee that is greater than the fee specified therein unless the contract or guarantee clearly and conspicuously discloses that such annual fee may be increased at Orkin's option. [3]

E. Modifying, changing, altering or attempting to modify, change or alter, the amount of the annual renewal fee or the duration of the level of that fee in any contract and/or guarantee unless the contract or guarantee clearly and conspicuously discloses that such a modification, change or alteration may be made at Orkin's option.

Provided, however, That nothing contained in this order shall prevent Orkin from seeking modification or novation of its pre-1975 contracts and pre-1975 guarantees that would permit, *inter alia,* a change in the annual fee to be paid or the services to be rendered, *provided further,* that Orkin may not seek such a modification or

novation until after the second anniversary of the renewal of any pre-1975 contract or guarantee that is renewed after the date this Order becomes final; *provided further,* that in any attempt to seek modification or novation of a pre-1975 contract as provided in this order, Orkin may not represent, directly or by implication, that a customer is required to agree to the modification or novation being sought. Orkin shall include with the reports on compliance required by Part V of this order:

(1) documents showing each and every representation, whether oral or written, made during the period covered by the report in connection with each such attempt to seek a modification or novation of any pre-1975 contract and/or pre-1975 guarantee;

(2) the names and addresses of any holder of a pre-1975 contract or guarantee with whom the respondent has communicated concerning modification or novation during the period covered by the report; and

(3) copies of each contract that is modified or subjected to novation as a result of these communications during the period coverd by the report.

II.

It is further ordered, That, within 60 days after the date this order becomes final, Orkin shall send a notice in the form prescribed below to each customer (except those customers for whom Orkin has previously rescinded its 1980 fee increase). The notice shall be sent by first class mail to the billing address provided for each such contract or guarantee and, where the address of the treated structure is different from the billing address,

to the address of the covered structure. The notice shall be sent no later than two months before the anniversary [4] date of the initial treatment under such contract or guarantee and shall read as follows:

Dear Customer:

This letter contains important information about a *decrease in the annual renewal fee.* Please read it.

Beginning in 1980, Orkin increased the annual renewal fee for lifetime guarantees offered in certain of its termite and related pest control contracts, including yours. The Federal Trade Commission has ordered Orkin to rescind this fee increase and to roll back your annual fee to the amount stated in your contract or guarantee. Under the terms of the Federal Trade Commission order, you will continue to receive the lifetime protection that Orkin has guaranteed as long as you pay the annual fee specified in the contract.

The Federal Trade Commission's order does not alter Orkin's right to terminate the guarantee or increase the fee under the terms of your original agreement if you have structurally modified the treated property. Absent such a structural modification, Orkin may not now or in the future increase that fee without your consent.

If you would like to continue your guaranteed protection, please submit your annual fee in the amount specified in your contract along with the enclosed invoice. We suggest you check the amount of the annual fee stated in your contract or guarantee with that of the enclosed invoice. If there is any dis-

crepancy or you have any other questions, please call your local branch.

Sincerely yours,

President of Orkin
[or other Orkin official]

Each envelope containing the foregoing notice shall bear the following legend in red, 14 point print on its face: IMPORTANT NOTICE OF ANNUAL FEE REDUCTION ENCLOSED. [5]

III.

It is further ordered, That, within 30 days after the date this order becomes final, Orkin shall distribute a copy of this order to each of its officers, directors, district managers and branch managers, and to each person who assumes any of these positions during each of the first two years of the date on which this order becomes final, and that Orkin shall secure from each of these persons a signed statement acknowledging receipt of said order.

IV.

It is further ordered, That Orkin shall maintain for a period of five years after the date on which this order becomes final records showing the manner and form of Orkin's compliance with this order and shall make them available for inspection by the Commission within 30 days of receipt of a request for an inspection.

V.

It is further ordered, That Orkin shall within 60 days after the date this order becomes final and every 180

days thereafter for a period of three years, file with the Commission a written report setting forth in detail the manner and form in which it has complied and is complying with this order, and shall file such other reports of compliance as the Commission may from time to time require.

VI.

It is further ordered, That Orkin shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent corporation, such as dissolution, assignment or sale [6] resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

APPENDIX B

ORKIN EXTERMINATING COMPANY, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

No. 87-8285.

United States Court of Appeals,
Eleventh Circuit.

July 15, 1988.

Exterminating company sought review of order of Federal Trade Commission that company cease and desist from conduct which Commission found to constitute unfair acts or practices in violation of Federal Trade Commission Act. The Court of Appeals, Clark, Circuit Judge, held that: (1) exterminating company's lifetime guarantees for termite control, which contained provision for renewal upon payment of set annual fee, were not ambiguous; (2) Commission properly refused to consider extrinsic evidence on question of whether termite control contracts were ambiguous as to duration of renewal fees provision; (3) company's unilateral breach of over 200,000 termite control contracts by raising set annual renewal fee was unfair practice within meaning of Federal Trade Commission Act; and (4) practice may be found unfair under Federal Trade Commission Act without showing that offending party intended to cause consumer injury.

Affirmed and order of enforcement issued.

1. Contracts (Key) 176(1)

Federal Civil Procedure (Key) 2492

When language of contract is unambiguous, legal effect of language is question of law, and question of whether contractual ambiguity existed may be resolved summarily.

2. Contracts (Key) 143(2)

Contract term is ambiguous if reasonably susceptible of more than one interpretation.

3. Contracts (Key) 190

Contracts containing lifetime "guarantee" for termite control services unambiguously provided that annual renewal fee would not increase, absent structural modification of home.

4. Contracts (Key) 215(1)

Exterminating company's contracts providing lifetime guarantee for termite control upon payment of set annual renewal fee were not terminable by company after "reasonable" period of time; agreements were not indefinite as to duration, as fees could be modified upon structural modification of treated premises.

5. Administrative Law and Procedure (Key) 461

Trade Regulation (Key) 798

Federal Trade Commission properly refused to consider extrinsic evidence to interpret exterminating com-

pany's lifetime guarantees for termite control, as contracts were unambiguous as to duration of annual renewal fees.

6. Trade Regulation (Key) 761

Federal Trade Commission properly determined that exterminating company's unilateral breach of over 200,000 termite control contracts containing provision for lifetime guarantee upon payment of set annual renewal fee by raising fees was unfair act or practice in violation of Federal Trade Commission Act. Federal Trade Commission Act, § 5, as amended, 15 U.S.C.A. § 45.

7. Trade Regulation (Key) 799

In determining that exterminating company breached termite control contracts, which contained provision for lifetime guarantee upon payment of set annual renewal fee by raising fee, Federal Trade Commission correctly found that exterminating company's actions resulted in substantial injury to consumers; during four-year period, company received more than $7 million in revenues from renewal fees to which company was not entitled. Federal Trade Commission Act, § 5, as amended, 15 U.S.C.A. § 45.

8. Trade Regulation (Key) 801

In determining that exterminating company's breach of lifetime guarantees for termite control by raising set annual renewal fee constituted unfair practice, Federal Trade Commission properly found that consumers could not reasonably have avoided harm caused by company's conduct; contracts gave no indication that company would raise renewal fees as a result of inflation or for any other reason, and "accommodation program" instituted by com-

pany to mitigate increase in fees was available only to those consumers who complained about increases in renewal fees. Federal Trade Commission Act, § 5, as amended, 15 U.S.C.A. § 45.

9. Trade Regulation (Key) 761

In determining that exterminating company's unilateral breach of lifetime guarantees for termite control by raising set annual renewal fees was unfair practice, Federal Trade Commission properly applied its own policy statement defining "unfairness." Federal Trade Commission Act, § 5, as amended, 15 U.S.C.A. § 45.

10. Trade Regulation (Key) 810

Federal Trade Commission's decision finding that exterminating company's unilateral breach of lifetime guarantees for termite control by raising set annual renewal fees was unfair practice did not represent significant departure from prior Commission precedent; Commission was not required to find that unfair practice was also deceptive, particularly in light of extraordinary level of consumer injury caused by breach of consumer contracts. Federal Trade Commission Act, § 5, as amended, 15 U.S.C.A. § 45.

11. Trade Regulation (Key) 777

Exterminating company's reliance upon advice of counsel in breaching lifetime guarantees for termite control by raising set annual renewal fees was not a defense to unfair practice charge brought by Federal Trade Commission, as mental state of company was irrelevant. Federal Trade Commission Act, § 5, as amended, 15 U.S.C.A. § 45.

12. Trade Regulation (Key) 761

A practice may be found unfair to consumers in violation of Federal Trade Commission Act without showing that offending party intended to cause consumer injury. Federal Trade Commission Act, § 5, as amended, 15 U.S.C.A. § 45.

Frank C. Jones, John C. Staton, Jr., Sylvia M. King, Michael Eric Ross, Atlanta, Ga. for petitioner.

Melvin H. Orlans, F.T.C., Office of Gen. Counsel, Washington, D.C., Katharine B. Alphin, Chris M. Couillou, F.T.C., Atlanta, Ga., for respondent.

CORRECTED OPINION

Petition for Review of an Order of the Federal Trade Commission.

Before VANCE and CLARK, Circuit Judges, and GARZA,* Senior Circuit Judge.

CLARK, Circuit Judge:

Orkin Exterminating Company ("Orkin" or "the company"), a wholly owned subsidiary of Rollins, Inc., ("Rollins") has petitioned this court for a review of an order issued by the Federal Trade Commission ("FTC" or "the Commission") which requires Orkin to cease and desist from conduct which the Commission found to constitute unfair acts or practices within the meaning of section 5 of the Federal Trade Commission Act ("FTCA"), 15 U.S.C.

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*Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

§ 45(a)(1), (2) ("Section").[1] The Commission found that Orkin violated section 5 by unilaterally breaching over 200,000 contracts with its customers. Having concluded that the Commission committed no errors, and that the Commission acted within its authority, we affirm and enforce the Commission's order. *See* 15 U.S.C. § 45(c), (d) (vesting courts of appeals with jurisdiction to affirm, enforce, or modify, or set aside Commission orders).

I

According to its officers, Orkin is the largest termite and pest control company in the world.[2] Among the services which Orkin offers to its customers is the treatment of houses, buildings and other structures for the destruction of and protection against termites and other wood infesting organisms. Orkin's agreements with its customers to provide these services are typically embodied in standard printed forms which are not subject to modification by Orkin's agents or customers.

Prior to 1966, Orkin's customers could purchase guarantees for continued protection of a treated structure by

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1. Section 5 provides, in pertinent part:

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

15 U.S.C. § 45(a)(1), (2).

2. Our statement of the facts, which are undisputed unless otherwise indicated, is drawn from the Commission's opinion, reported at 108 F.T.C. 341 (1986).

paying a specified fee. These guarantees lasted for a stated period, typically between five and fifteen years. In 1966, Orkin began to offer similar guarantees that were, by the terms of its contracts, to last the "lifetime" of a treated structure. Between January 1966, when Orkin started to offer these "lifetime" guarantees, and February 1, 1975, Orkin's contracts for termite protection and control ("pre-1975 contracts") provided that a customer could renew the coverage of its "lifetime" guarantee by paying an annual renewal fee, the amount of which was specified in the contract. The contracts state that as long as a customer continues to pay this annual fee, the guarantee remains in effect for the lifetime of the treated structure, unless the structure is structurally modified after the initial treatment date.

Although these contracts varied slightly from time to time with regard to the types of guarantees available,[3] each contained a provision similar to those quoted below. For example, a contract dated November 30, 1966 contains this language:

GUARANTY

The Guaranty checked above will be issued and delivered to the Purchaser upon completion of initial

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3. Orkin offered several kinds of lifetime guarantees, including a lifetime retreatment guarantee, a lifetime retreatment and repair guarantee and a lifetime guarantee on pretreatment work on new construction. Generally, the first two of these guarantees provide that after initial treatment and at no extra cost to the customer, Orkin respectively will retreat the covered structure if new infestations occur and make repairs (up to a stated dollar maximum) if it is established that the new damage occurred after initial treatment. The pretreatment guarantee is similar but applies to new construction rather than to existing structures.

108 F.T.C. at 343 (citations to record omitted).

treatment. Guaranty will be effective so long as payment is made in accordance with the Terms and Conditions of this Service Order.

It is further agreed that Guaranty will provide for an initial term of:

[X] 12 months. ORKIN will reinspect the premises upon expiration of the initial term and upon receipt of the Annual Renewal Fee [$18.00].

. . . .

Guaranty at the sole option of the Purchaser may be renewed annually by making payment of the Annual Renewal Fee on or before the renewal date of each subsequent year.

Record, Vol. II at 385. A February 5, 1972 contract provides:

ORKIN'S CONTINUOUS PROTECTION GUARANTEE

Orkin's Continuous Protection Guarantee will provide protection of the above named property including Annual Reinspections upon payment of the initial charges and an Annual Renewal Payment of $37.00 starting February 1973 and each February thereafter.[4]

The type of Guaranty checked above will be issued and delivered to the Purchaser upon completion of initial treatment. Guaranty will be effective for an initial period of 12 months and thereafter so long as payments are made in accordance with the Terms and Conditions of this Contract.

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4. The underlined words are handwritten in the original agreements.

Record, Vol. II at 384. A November 2, 1973 agreement contains this variation:

ORKIN CONTINUOUS PROTECTION GUARANTEE

> The guarantee checked above will be issued to the buyer upon completion of initial treatment. The Guarantee will cover the above named premises and will be subject to the General Terms and Conditions on the reverse side hereof. Its coverage, including annual reinspection, will be effective for a period of 1 years upon payment of the initial charges and thereafter for a period of Life years, so long as renewal payments of $15. are made annually.

Record, Vol. III at 422. In addition to these guarantee provisions, all of the contracts stated specifically that Orkin could adjust the annual renewal fee in the event of a structural modification to the treated premises.[5] No other provision in the contract indicates that these fees are subject to increases.

For six months during 1968, by way of billboards, magazines, and radio and television spots, Orkin promoted its termite control services through an advertising campaign which Orkin labelled the "Orkin 12 Point Plan."

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5. The following language is typical:

> This agreement covers the premises diagramed on the Graph and Specification Sheet bearing the Contract Number as of the date of actual treatment, and in the event the premises are structurally modified, altered or otherwise changed after the date of initial treatment, this agreement shall terminate unless a prior written agreement shall have been entered into between the Owner and the Company to reinspect the premises, provide additional treatment and/or adjust the Annual Renewal Fee.

Record, Vol. III at 398.

"Point 6" in this campaign, printed in a pamphlet issued to consumers, clearly indicated that annual renewal fees were not subject to increases:

> LIFETIME GUARANTEE Orkin's lifetime termite protection plan includes annual reinspections and retreating when necessary. This protects the property against termite reinfestation for the life of the structure provided the lifetime guarantee is renewed annually. The yearly premium for this lifetime protection *is very modest and never increases.* In case of a sale, the guarantee is transferable.

Record, Vol. II at 351 (emphasis in original). The "Orkin 12" campaign was discontinued before its scheduled expiration date because it had not been effective. Orkin does not contend that the contracts it made during this period in 1968 are in any way materially different from all other pre-1975 contracts.

In 1978, Orkin began to consider increasing the annual renewal fees contained in the pre-1975 contracts. Rollins's general counsel concluded initially that there was no contractual basis for an increase. Yet convinced that Orkin could not have intended to lock the company into a perpetually fixed contract, he sought the advice of the company's law firm. A memorandum produced by the law firm considered the question whether "there [are] any grounds for the claim that a contract which may be renewed or extended from year to year, indefinitely, is unenforceable." It concluded that one unidentified Orkin contract appeared "to be of *indefinite* duration" and would therefore be "terminable by Orkin after a reasonable period of time." Record, Vol. II at 337 (emphasis in original). Rollins's general counsel endorsed the memoran-

dum's legal conclusions to Orkin's management. Record, Vol. II at 343-44.

In early 1980, Gary W. Rollins, Orkin's president, prepared a memorandum for Rollins's president R.R. Rollins, outlining the "'pros and cons' regarding raising the renewal amount" of the pre-1975 contracts. That memorandum reads as follows:

PROS

1. Potential income increase of $2,286,614 (# 232,969 accounts valued at $6,017,406 × 40% increase less 5% cancellations)

CONS

1. A few customers advised by salesmen and literature that renewal amount would be fixed.
2. State regulatory agencies (Pest Control, Consumer Protection, etc.) could interpret our contract in some cases to imply the renewal amount is fixed. Those who obtain old proposal information will discover we put this in writing.
3. Our longer term employees might feel that we are going back on our word.
4. There could be customer lawsuits and complaints.

OPTIONS

1. Leave as is.
2. Write customers and put on voluntary basis.
3. Meet with individual state regulatory and consumer groups to obtain understanding and raise.
4. Raise and handle exceptions.

Record, Vol. II at 348.

In August 1980, Orkin began notifying customers who were parties to pre-1975 contracts that the company was going to increase its annual renewal fees. Increase notices were sent to approximately 207,000 pre-1975 customers.

> The annual fees were raised to a minimum of $25 or by 40%, whichever was greater. . . . By August 1, 1984, Orkin had increased the annual renewal fees of approximately 142,902 customers with pre-1975 contracts. By May 25, 1981, Orkin had received an additional $1,257,629 solely as a result of the fee increase to its pre-1975 customers, and [Orkin] estimates . . . show that it had received increased revenues through 1984, from the same source, of $7,515,674.

108 F.T.C. at 347 (footnote omitted).

Many of Orkin's customers complained about the increase in their annual renewal fees. In addition, various officials in seventeen states questioned the lawfulness of Orkin's actions. But customers did not have any real alternative to paying the increased renewal fees. Although some of Orkin's competitors were willing to assume Orkin's obligations of the pre-1975 contracts, they apparently would not have done so "without imposing conditions that would have resulted in additional charges to Orkin's customers or subsequently raising the renewal fees as expressly permitted in their own contracts." 108 F.T.C. at 347 (footnote omitted).

In light of customer complaints, Orkin developed what it refers to as an "accommodation program." In a form letter sent to complaining customers, Orkin at-

tributed the increase to inflation. It further explained that although the pre-1975 contracts "did not specifically mention increases," the increase was "both consistent with law and reasonable business standards," given the losses Orkin had absorbed. Record, Vol. III at 414. In a closing sentence, the letter says, "We appreciate your concern and hope that you now understand our position and will submit your renewal payment to keep your coverage in force." Record, Vol. III at 415. As an additional part of its "accommodation program," Orkin developed some limited exceptions to its across-the-board increases in the renewal fees for pre-1975 contracts. But customers were not directly informed of these exceptions in the form letter sent to complaining customers. Instead, John Raymond, Orkin's Director of Administrative Operations instructed Orkin's branch managers, by way of an August 13, 1980 memorandum, to handle complaints in the following manner:

> If a customer tells you that our pre-1975 contract does not allow for an increase, you should explain that prior to the inflation spiral, practically no one had this provision in the contracts. Recent legal rulings interpret this as meaning that the renewal fee shall remain unchanged for a *reasonable period* which we interpret to be no more than five years.
>
> If a customer with a contract sold prior to 1975 questions the 40% increase, you should state that this increase does not bring their rate to current renewal levels, however, they are still being treated as a preferred customer. With inflation at approximately 10% per year, a 40% increase on a contract that remains constant for more than five years is still less than the cumulative inflation rate.

> If the customer states they have sales literature that specifically states there will not be an increase in the renewal fee, you should ask them to read the statement to you. Some customers sold between 1967 and 1968 were given a pamphlet that stated the renewal fee would never increase. This statement was in the "Orkin 12 Point Plan." . . .
>
> . . . .
>
> If any of your customers tell you they have a pamphlet in their possession that prohibits an increase you should ask them to read to you the exact wording. If the wording is not verbatum [sic] as stated in "point 6" above they are, in fact, eligible for an increase. If their material does have this statement, and you confirm it, then tell the customer a computer mistake was made and a corrected bill will be sent. Ask them not to pay until a correct bill is received.
>
> Attached are the procedures to use to get the renewal fee corrected for the "point 6" customers. However, it is very important to remember that there are only a very few of these customers.

Record, Vol. III at 444-45. Eventually, Orkin decided to roll back all increases for customers who had entered into a contract in 1968, the year in which the "Orkin 12" campaign had appeared. Orkin's "accommodation program" expanded again in December 1980, when Raymond directed Orkin's branch managers to retract increases in renewal fees for all pre-1975 customers who stated that they believed the renewal fees were not subject to increase and relied on either (1) a sales presentation or (2) their own construction of the contract's terms.

As of August 1984, Orkin had, through its "accommodation program," rolled back the renewal fees of some 21,500 customers, approximately 16,000 of which were 1968 customers. Over 42,000 customers had cancelled their pre-1975 contracts, although the record does not reflect the reasons for these cancellations.

II

In May 1984, the FTC issued an administrative complaint charging that Orkin had committed an unfair act or practice in violation of section 5. The complaint alleged that Orkin's pre-1975 contracts provided for a fixed annual renewal fee and that Orkin had violated the terms of these contracts by unilaterally raising the fees specified therein.

After conducting some pretrial discovery, counsel for the FTC supporting the complaint ("complaint counsel") moved for a summary decision pursuant to Rule 3.24 of the Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.24(a) ("Commission Rule 3.24"). Orkin filed a cross-motion for summary decision on the ground that conduct which is not alleged to be deceptive cannot constitute an "unfair act or practice" within the meaning of section 5. The Administrative Law Judge responsible for the case ruled in favor of the Commission. The ALJ found specifically that (1) that Orkin's pre-1975 contracts did provide for a fixed renewal fee and that Orkin had breached these contracts by attempting to raise the renewal fees; (2) these breaches of contract could constitute a violation of section 5; (3) there was substantial consumer injury; (4) consumers could not reasonably have avoided this injury; and (5) there were no countervailing benefits to consumers or

competition. The ALJ entered an order requiring Orkin to roll back all fees in pre-1975 contracts to the levels specified in those contracts.

Orkin appealed the ALJ's decision to the Commission. The Commission affirmed all aspects of the ALJ's decision. In addition, the Commission concluded that summary decision was appropriate because Orkin had failed to "set forth specific facts showing that there is a genuine issue of fact for trial," as is required by Commission Rule 3.24(a)(3) if a party wishes to avoid an adverse summary decision.

In its petition for review of the Commission's decision, Orkin has raised three basic arguments. First, Orkin claims that the Commission erred in concluding that the pre-1975 contracts unambiguously provided for a fixed annual renewal fee. Orkin charges that in disposing of this question summarily, the Commission also erred in failing to consider certain extrinsic evidence proffered by Orkin, and in making inappropriate findings of fact. Second, Orkin argues, as it did before the Commission, that the Commission exceeded the authority conferred upon it by section 5. Finally, Orkin argues that the Commission erred in refusing to consider evidence that Orkin relied upon advice of counsel.

III

Orkin challenges the Commission's legal conclusion that the pre-1975 contracts were unambiguous with regard to the duration of the stated renewal fee and contends that the Commission should not have resolved the issued summarily, pursuant to Commission Rule 3.24. As the Commission acknowledged, it "cannot try issues of fact

on a motion for summary decision but can only determine whether there are issues to be tried." 108 F.T.C. at 350.[6]

[1, 2] Under well-established principles of contract law, where the language of a contract is unambiguous, the legal effect of that language is a question of law. *Mason Drug Co., Inc. v. Harris,* 597 F.2d 886 (5th Cir.1979). Because the question of whether a contractual ambiguity exists is also a question of law, it "may be resolved summarily." C. Wright, A. Miller & M. Kane, 10A *Federal Practice and Procedure,* § 2730.1 at 279 (1983) (citing *Freeman v. Continental Gin Co.,* 381 F.2d 459 (5th Cir.1967) (other citations omitted). A contract term is ambiguous if "reasonably susceptible to more than one interpretation." *Fabric Italiana Lavorazione Materie Organiche, S.A.S. v. Kaiser Aluminum & Chemical Corp.,* 684 F.2d 776, 780 (11th Cir.1982). But "[a]n ambiguity in a contract cannot be created by the mere assertion of a party to it." The fact that the meaning of a contract term is disputed likewise reveals no ambiguity. *Vreeland v. Federal Power Comm'n,* 528 F.2d 1343, 1351 (5th Cir.1976).

[3] Orkin claims that its pre-1975 contracts are ambiguous as to whether Orkin may increase the annual renewal fee because the contracts do not speak to this question explicitly. In rejecting this argument, the Commission explained,

> It is undisputed that [the pre-1975 contracts] refer to "lifetime" services and guarantees. They specify

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6. In deciding which cases and issues are subject to summary disposition, the Commission follows federal case law concerning the propriety of summary judgment pursuant to Fed.R.Civ.P. 56. 108 F.T.C. at 350 n. 11 (citing *The Hearst Corp.,* 80 F.T.C. 1011, 1014 (1972); *Lehigh Portland Cement Co.,* 78 F.T.C. 1556, 1557 (1971)). We have evaluated the Commission's summary disposition of this case in light of the principles governing the operation of Fed.R.Civ.P. 56.

> an annual renewal fee, and they contain no language that suggests in any way that the renewal fee may change during the lifetime of the treated structure or that the duration of the stated renewal fee is different from the "lifetime" duration of the guarantee, assuming timely annual payments. The contracts provide expressly for fee adjustments in circumstances involving extension of the guarantee where the treated premises have been structurally modified. This express provision for certain adjustments makes the absence of language anticipating other adjustments even more significant. . . . The fact that the contracts Orkin used before 1966 and after 1975 contain express language permitting renewal fee increases regardless of whether structural modification occurred also strongly suggests that the contracts at issue are properly read to provide for a fixed renewal fee.

108 F.T.C. at 352-53 (footnote omitted). Orkin charges that the Commission "ignore[d] the fact that the lifetime guarantee and the annual renewal fee that must be paid to continue it are *separate* features of the contracts." Orkin Brief at 32. Thus, Orkin argues, because the Commission necessarily "impl[ied] a durational term for the stated annual renewal fee," this reveals that the contract is ambiguous on this point. *Id.* at 33.

In fact, Orkin raised the argument that the guarantee and renewal fee provisions are severable before the Commission. We agree with the Commission that this argument runs contrary to the plain language in the various contracts. As the Commission explained,

> The box indicating that the customer selected a lifetime guarantee is on the same page as the provision

> for a specified annual renewal payment. The entire page is surrounded by a continuous geometric border of the sort often seen on printed form contracts. The interpretation clause, most frequently found on the second page, refers to "the complete agreement between the parties."
>
> We see nothing whatsoever on the face of the document to suggest that it is anything other than a single contract, nor has Orkin, aside from its conclusory assertion, provided any reason for the artificial distinction it proposes.

108 F.T.C. at 354-55 (footnote omitted). Even the most cursory reading of the pre-1975 contracts indicates that the guarantee and renewal fee provisions are inextricably linked, and more importantly, coextensive as to their duration. Of those contracts quoted above, each makes clear that the lifetime guarantee issued to customers will be renewed upon timely payment of "*the* Annual Renewal Fee," the amount of which is stated, "an Annual Renewal Payment of $37.00," or "renewal payments of $15."

[4] One additional fact not emphasized by the Commission is that each contract contains language which further indicates that renewal of the guarantee (by payment of the *stated* fee) is to continue, so long as the covered premises are not structurally modified.[7] The first

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7. This does not mean, as Orkin has suggested, that the contracts should be construed so as to provide for termination of the stated annual renewal fee after a "reasonable" period of time. It is true that contracts which are indefinite as to their duration are, upon notice, terminable at will after a reasonable period of time. *See A.M.R. Enterprises, Inc. v. United Postal Savings Ass'n*, 567 F.2d 1277, 1280-81 (5th Cir.1978). This rule does not apply, however, to cases in which the disputed agree-

(Continued on following page)

of those contracts we have quoted provides that the "Guaranty will be effective *so long as payment is made* in accordance with the Terms and Conditions" of the agreement. The second provides that the guarantee will remain in effect upon payment of the stated renewal fee "starting February 1973 and each February *thereafter.*" Even more devastating to Orkin's argument is the third of those contracts, which provides that the guarantee "will be effective for an initial period" "and *thereafter* for a period of Life years, *so long as*" the stated renewal payment is made "annually." Given the plain language of these agreements, we reject as unreasonable Orkin's suggestion that they are silent as to the duration of the stated annual renewal fees.[8]

Footnote continued—

ment provides for termination or cancellation upon the occurrence of a specified event. *See, e.g., Payroll Express Corp. v. Aetna Casualty & Surety Co.*, 659 F.2d 285, 291 (2d Cir.1981) (New York law); *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1012 (7th Cir.1985) (Illinois law); *Southern Housing Partnerships, Inc. v. Stowers Mgmt. Co., Inc.*, 494 So.2d 44, 47-48 (Ala.1986). Thus, because Orkin's pre-1975 contracts provide specifically that the Company may raise the annual renewal fees upon structural modification of the treated premises, the duration of the stated annual renewal fee is not "indefinite," as that term is generally understood. As the Commission noted, and, as every homeowner knows, "Houses do not last forever absent structural modification." 108 F.T.C. at 355 n. 39.

8. The only case cited by Orkin in support of its severability argument is *A.M.R. Enterprises, Inc. v. United Postal Savings Ass'n*, 567 F.2d 1277 (5th Cir.1978). In that case, a corporation, by way of a commitment letter, agreed to make a one year loan to a real estate developer upon the fulfillment of certain conditions and the payment of a commitment fee. Before the developer could obtain a title insurance policy, the lender withdrew its commitment. Unable to meet its obligations, the developer lost the property when it was sold at a foreclosure sale. The developer sued the lender to recover the commitment fee and the cost of the property it had lost, alleging that the duration of the com-

(Continued on following page)

[5] The language of the contracts notwithstanding, Orkin argues that the Commission erred in refusing to consider certain extrinsic evidence which would prove that the contracts are ambiguous as to the duration of the annual renewal fees. As Judge Tuttle has noted, however,

> There is probably no better known rule of law than that which says that parol evidence may not be used to contradict the terms of an unambiguous contract.

Peterson v. Lexington Insurance Co., 753 F.2d 1016, 1018 (11th Cir.1985) (applying Georgia law); *see also Certain British Underwriters at Lloyds of London v. Jet Charter Service, Inc.*, 789 F.2d 1534, 1535 (11th Cir.1986) (applying Florida law). Some jurisdictions do permit resort to parol evidence to prove the existence of a "latent ambiguity" as an initial matter. Thus, applying Alabama law in *Cathbake Investment Co. v. Fisk Electric Company, Inc.*, 700 F.2d 654, 656 (11th Cir.1983), we held that resort to parol evidence was proper to determine whether a contract contained a "latent ambiguity." Orkin suggests that *Cathbake* compels a holding that the Commission erred in not considering extrinsic evidence. Even if the "latent ambiguity" doctrine were operative here, it would not be "applicable . . . because the parties' rights and obligations are clearly stated in the . . . agreement,

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Footnote continued—

mitment, like the term of the loan, was one year. The district court granted summary judgment for the developer on the issue of the lender's liability for return of the commitment fee. Relying on the clear language of the commitment letter, we held that this was improper because the commitment letter's reference to a one year term "referred to the loan and not the duration of the commitment" itself. *Id.* at 1281. Orkin's pre-1975 contracts are simply not subject to such a reading.

and there is no ambiguity that would warrant the introduction of parol evidence." *Hashwani v. Barbar*, 822 F.2d 1038, 1040 (11th Cir.1987) (per curiam) (applying Florida law). Even where a party seeks to prove a latent ambiguity, the interpretation urged by that party must be reasonable. No latent ambiguity exists unless the contract is actually susceptible to the meaning contended for by a party. *See Vineberg v. Brunswick Corp.*, 391 F.2d 184, 189 (5th Cir.1968) (applying Florida law). In seeking to prove a latent ambiguity, a party must attempt to resolve an actual ambiguity, not create one. *Zim v. Western Publishing Co.*, 573 F.2d 1318, 1323 (5th Cir.1978) (applying Wisconsin law). Because the interpretation urged by Orkin is unreasonable in light of the contracts' plain language, which excludes any possibility of an ambiguity, the Commission did not err in declining to consider such evidence.

Although the Commission recognized that it need not have undertaken to review Orkin's proffered extrinsic evidence, *see* 108 F.T.C. at 354, it did conduct a limited review:

> [W]e have examined the entire summary decision record to ascertain whether it reveals genuinely disputed issues of material fact as Orkin has alleged. We find none. Indeed, *to the extent that extrinsic evidence in the record is reliable and probative*, it supports our conclusion based on the contracts themselves.

Id. (emphasis added). Extrapolating from this statement, Orkin contends that the Commission violated basic principles governing summary judgment. To the extent that the Commission may have failed to view this ex-

trinsic evidence in the light most favorable to Orkin—something which is not readily apparent—such error was of no legal significance because the Commission understood fully that it was not bound to review this evidence at all. At the end of its discussion of the pre-1975 contracts, the Commission said,

> In considering the merits of a motion for summary decision, the Commission must draw all factual inferences against the moving party. Here no factual inferences were necessary.
>
> > "[I]n actions involving written contracts the parol evidence rule may so operate that there is no relevant factual issue in dispute, so that summary judgment may be rendered . . . under applicable principles of contract law."
>
> The Commission has interpreted the pre-1975 contracts through a reading of undisputed contract language with reference to applicable principles of contract law. We conclude, as did [the ALJ], that the "only logical interpretation of the Orkin 'pre1975' contracts is that the company has contracted to provide . . . for a fixed annual renewal fee."

108 F.T.C. at 359-60 (citing 6 *Moore's Federal Practice* ¶ 56.17[11] at 56-785 (1987)) (quoting ALJ's Initial Decision, *reprinted in* 108 F.T.C. 263, 312 (1986)) (footnotes omitted). Because the Commission properly rejected the suggestion that Orkin's proffered extrinsic evidence could make the contracts ambiguous, it could not have erred in its review of this evidence.

> [t]o justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.[10]

It is true that the emphasis placed by the Commission on consumer unfairness is "of comparatively recent origin." *A.F.S.* 767 F.2d at 971 n. 15 (citing Averitt, *The Meaning of "Unfair Acts of Practices" in Section 5 of the Federal Trade Commission Act*, 70 Geo.L.J. 225 (1981); Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 Wis.L.Rev. 107). But Orkin has not argued that the Commission's definition of what constitutes an unfair practice is itself outside the scope of the Commission's section 5 authority. Indeed, the courts reviewing applications of the Commission's unfairness standard have assumed, necessarily, that it is a valid standard. *See, e.g., A.F.S.*, 767 F.2d at 972.[11]

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10. This definition derived from a letter which the FTC wrote to Senators Danforth and Ford when Congress was considering an amendment to section 5 which would have defined unfair acts and practices. *See A.F.S.*, 767 F.2d at 970. Commonly referred to as the FTC's "Policy Statement" on the meaning of unfair acts and practices, the text of this letter is reprinted in H.R.Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 33-40 (1983), and Trade Reg.Rep. (CCH) ¶ 50,421 at 55,947-51.

11. The D.C. Circuit has noted that the Commission's approach to consumer unfairness has not been met with congressional objection:

> Congress has not seen fit to enact any more particularized definition of unfairness to limit the Commission's discretion. Indeed, the most significant congressional response to the Policy Statement has not been criticisms or rejection, but proposals to enact the Commission's three-part consumer injury standard into law.

A.F.S., 767 F.2d at 982 (citation omitted).

Nevertheless, as the ultimate authority charged with the construction of federal statutes, the courts must set aside Commission orders which are inconsistent with its statutory mandate or the intent of Congress. *FTC v. ColgatePalmolive Co.*, 380 U.S. 374, 385, 85 S.Ct. 1035, 1042, 13 L.Ed.2d 904 (1965). In deciding whether Orkin's conduct was "unfair," we owe "some deference" to the Commission's judgment on the issue. *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009, 2016, 90 L.Ed.2d 445 (1986).

We must therefore decide whether the Commission exceeded its authority in deciding that one company's unilateral breach of 207,000 consumer contracts could meet the Commission's definition of unfairness. As the Supreme Court has said,

> Once the Commission has chosen a particular legal rationale for holding a practice to be unfair, . . . familiar principles of administrative law dictate that its decision must stand or fall on that basis, and a reviewing court may not consider other reasons why the practice might be deemed unfair.

Id. 106 S.Ct. at 2016 (citations omitted). Of course, the Commission's three-part standard does little to isolate the specific types of practices and consumer injuries which are cognizable. But "the consumer injury test is the most precise definition of unfairness articulated by either the Commission or Congress"; consequently, we must resolve the validity of the Commission's order "by reviewing the reasonableness of the Commission's application of the consumer injury test to the facts of this case, and the consistency of that application with congressional policy and prior Commission precedent." *A.F.S.*, 767 F.2d at 972; *see also Indiana Federation of Dentists*, 106 S.Ct. at 2016.

act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential avenues toward that end." 108 F.T.C. at 366.

The Commission determined that "neither anticipatory avoidance nor subsequent mitigation was reasonably possible for Orkin's pre-1975 customers." *Id.* at 366. Anticipatory avoidance through consumer choice was impossible because these contracts give no indication that the company would raise the renewal fees as a result of inflation, or for any other reason.

As for mitigation of consumer injury, the Commission concluded that the company's "accommodation program" could not constitute an avenue for avoiding injury because relief from Orkin's conduct was available only to those customers who complained about the increases in the renewal fees. 108 F.T.C. at 367. Orkin contends that this question should not have been resolved on a motion for summary disposition, yet the company does not dispute that pre-1975 customers were not directly informed of the "accommodation program" unless they complained about an increase.[14] Given that consumer information is central to this prong of the unfairness inquiry,[15] it was proper for the Commission to determine summarily that the "accommodation program" did not provide pre-1975

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14. As the Commission noted, "it would have been pointless for Orkin to effectuate the fee increase and, simultaneously, to notify its customers that if they preferred not to pay the higher amount, they need not do so." 108 F.T.C. at 367.

15. "Whether some consequence is 'reasonably avoidable' depends, not just on whether people know the physical steps to take in order to prevent it, but also on whether they understand the necessity of actually taking those steps." *International Harvester,* 104 F.T.C. at 1066.

customers with any real opportunity to mitigate their injuries.

The Commission also rejected the claim that customers could have avoided their injuries by electing to transfer their business to one of Orkin's competitors. Again, Orkin claims that this question was not subject to summary disposition. In affidavits that were before the Commission, some of Orkin's competitors did testify that they would assume the company's pre-1975 contracts at the renewal fees stated therein. Yet there is no evidence that Orkin's pre-1975 customers could have contracted with competitors for a renewal fee that would be subject to increase only upon structural modifications of the subject property. *See* 108 F.T.C. at 367.[16] Because Orkin failed to present such evidence, it was not error for the Commission to rule summarily that this purported avenue of relief did not create a real choice to consumers who might seek to avoid their injuries.[17]

C

[9] In addition to challenging the Commission's conclusions regarding its unfairness standard, Orkin argues

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16. In fact, the examples of competitors' contracts appended to two of these affidavits provide expressly for increases in renewal fees "[a]fter the fifth year and each year thereafter," "[a]fter the fifth year," and "after the first six (6) years and each six years thereafter." Record, Vol. I at 234, 235; Petitioner's Exhibit 11.

17. The additional grounds given by the Commission also support its conclusion. By transferring its business to another company, a pre-1975 customer would lose a benefit derived from dealing with a pest control firm of Orkin's stature. Transfer to a rival firm would also entail transaction costs associated with the "search for a reliable frm willing to provide the same services on the same terms . . . and to complete a new agreement with that firm." 108 F.T.C. at 368.

IV

Section 5 declares that "unfair or deceptive acts or practices in or affecting commerce" are unlawful, 15 U.S.C. § 45(a)(1); it also empowers the Commission to prevent certain entities from engaging in behavior that constitutes "unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(2).

A

[6] Orkin contends that a "mere breach of contract," which does not involve some sort of deceptive or fraudulent behavior, is outside the ambit of section 5. In support of this proposition, Orkin cites cases that have interpreted state statutes similar to the FTCA, commonly referred to as a "little" section 5 laws, to require "something more" than a simple breach of contract before a given course of conduct can be found "unfair or deceptive." *See United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054, 102 S.Ct. 599, 70 L.Ed.2d 590 (1981) (construing N.C. Gen.Stat. § 75-1.1(a)); *Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc.*, 754 F.2d 10 (1st Cir.1985) (construing Mass.Gen.Laws Ann. ch. 93A § 2).

Orkin's argument is clearly inconsistent with the ways in which the FTC's unfairness authority has developed, as a result of both legislation and judicial interpretation. *See American Financial Services v. F.T.C.*, 767 F.2d 957, 965-72 (D.C.Cir.1985) ("*A.F.S.*"), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1185, 89 L.Ed.2d 301 (1986). The Supreme Court, for example, has "put its stamp of approval on the Commission's evolving use of a consumer unfairness doctrine not moored in the traditional rationales of anticompetitiveness or *deception*." *Id.*

at 971 (emphasis added) (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972)). Moreover, as the Commission noted, there is nothing which constrains it to follow judicial interpretations of state statutes in construing the agency's section 5 authority. *See* 108 F.T.C. at 361. Orkin's suggestion that we should rely on these cases overlooks the fact that it is the Commission itself which is charged, by statute, with the duty of prescribing "interpretative rules and general statements of policy with respect to unfair or deceptive acts or practices (within the meaning of section [5])." 15 U.S.C. § 57a(a)(1).[9]

In 1980, the Commission promulgated a policy statement containing an abstract definition of "unfairness" which focuses upon unjustified customer injury. *See A.F.S.*, 767 F.2d at 971. Under the standard enunciated in this policy statement,

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9. Even if we thought it prudent to take guidance from readings of these state statutes by federal courts, the cases cited by Orkin would be far from persuasive. The North Carolina Supreme Court, using section 5 as an interpretative guide to construe North Carolina's "little" section 5, has said that "[w]hile an act or practice which is unfair may also be deceptive, or vice versa, it need not be so for there to be a violation of the Act." *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610, 621 (1980). This statement, consistent with section 5's disjunctive ("unfair or deceptive") language, substantially undercuts Orkin's position that a breach of contract must somehow be deceptive or fraudulent before becoming subject to the FTC's authority. The Fourth Circuit's construction of the North Carolina statute in *United Roasters* is, therefore, hardly persuasive here. In addition, the Massachusetts statute construed by the First Circuit in the *Checkers* case provides specifically that courts "will be guided" in their interpretation of that statute "by the interpretations given by the Federal Trade Commission and the Federal Courts to section (5)(a)(1)" of the FTCA. Mass.Gen.Laws.Ann. ch. 93A § 2(b). In *Checkers*, the First Circuit did not construe section 5; it only cited a Massachusetts case which had held that "mere breaches of contract, without more, do not violate chapter 93A." 754 F.2d at 18 (citing *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 390 N.E.2d 243 (1979)).

B

[7] The first prong of the unfairness standard requires a finding of substantial injury to consumers. In finding that Orkin's conduct had caused the requisite harm, the Commission said,

> The harm resulting from Orkin's conduct consists of increased costs for services previously bargained for and includes the intangible loss of the certainty of the fixed price term in the contract.

108 F.T.C. at 362. The Commission's finding of "substantial" injury is supported by the undisputed fact that Orkin's breach of its pre-1975 contracts generated, during a four-year period, more than $7,000,000 in revenues from renewal fees to which the Company was not entitled. As the Commission noted, although the actual injury to individual customers may be small on an annual basis, this does not mean that such injury is not "substantial." 108 F.T.C. at 362 (citing *In re International Harvester, Co.*, 104 F.T.C. 949, 1064 n. 55 (1984)); *see also A.F.S.*, 767 F.2d at 972 (Commission's Policy Statement makes clear that injury may be sufficiently substantial if it causes small harm to a large class of people); Averitt, 70 Geo.L.J. at 246.[12]

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12. This is something which was recognized shortly after the original FTCA's passage. As Justice Brandeis explained in the context of an unfair competition case,

> [t]o justify filing a [section 5] complaint the public interest must be specific and substantial. Often it is so . . . because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it.

F.T.C. v. Klesner, 280 U.S. 19, 28, 50 S.Ct. 1, 4, 74 L.Ed. 138 (1929) (footnote omitted).

[8] As for the second prong of the unfairness standard, the Commission noted that "conduct can create a mixture of both beneficial and adverse consequences." 108 F.T.C. at 364 (citing *International Harvester,* 104 F.T.C. at 1061). But because "[t]he increase in the fee was not accompanied by an increase in the level of service provided or an enhancement of its quality," the Commission concluded that no consumer benefit had resulted from Orkin's conduct. 108 F.T.C. at 364. The Commission also rejected various arguments that an order requiring Orkin to roll back its fee increases "would have adverse effects on its entire customer base and on many of its competitors." 108 F.T.C. at 365. On appeal, Orkin has not challenged the Commission's conclusions regarding consumer benefits and benefits to competition.

With regard to the third prong of the unfairness standerd, the Commission concluded that consumers could not have reasonably avoided the harm caused by Orkin's conduct. The Commission's focus on a consumer's ability to reasonably avoid injury "stems from the Commission's general reliance on free and informed consumer choice as the best regulator of the market." *A.F.S.,* 767 F.2d at 976. *See also, International Harvester,* 104 F.T.C. at 1061.[13] As the Commission explained, "Consumers may

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13. "Normally," the Commission "expect[s] that marketplace to be self-correcting, and [it] rel[ies] on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market." Policy Statement, H.R.Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 37 (1983); Trade Reg.Rep. (CCH) ¶ 50,421 at 55,948. Yet "certain types of seller conduct or market imperfections may unjustifiably hinder consumers' free market decisions. . . ." It is in these instances that corrective action by the Commission is justified. *A.F.S.,* 767 F.2d at 976 (citing Policy Statement, H.R.Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 37 (1983); Trade Reg.Rep. (CCH) ¶ 50,421 at 55,948).

that the tests enunciated in the Commission's Policy Statement did not constitute the "real" basis of the Commission's decision. Orkin contends that the Commission did not adhere to the "familiar principle[]" that its decisions must rest on the basis which it actually articulates. This argument derives from the following statement in the Commission's opinion:

> The conduct at issue in this proceeding is not the breach of a single contract but . . . rather the widespread, systematic program Orkin implemented to effect a unilateral modification of its own standard contract terms agreed to by many thousands of consumers.

108 F.T.C. at 361 (footnote omitted). Quoting this single sentence, Orkin reasons that "the Commission ruled that Orkin committed an unfair trade practice because there was a 'widespread, systematic program' to breach multiple contracts." It contends that "this new exception" to the Commission's otherwise limited authority under section 5 is not properly applied to the facts of this case because the Commission failed to make findings as to what specific acts constituted a "systematic program." Orkin Brief at 22. Accordingly, Orkin claims that the Commission violated the Administrative Procedure Act's requirement that agency adjudicative decisions set forth the basis of each material finding of fact. *See* 5 U.S.C. § 557(c).

Orkin's pericopal reading of the Commission's opinion is, to say, the least, highly misleading. It is clear from the Commission's opinion that the Policy Statement's consumer injury standard was the focus of its analysis. After a review of the undisputed facts in the case, the opinion contains a section entitled "Conclusions of Law," in which the Commission said,

> The issue before us is whether Orkin has engaged in an unfair act or practice under Section 5 by unilaterally increasing the renewal fees in its pre-1975 contract. This is not an action at common law for simple breach of contract. Rather it is an action under a federal statute that makes unlawful conduct causing *injury to consumers that is substantial, unavoidable and without countervailing benefits.* Because determining whether Orkin's conduct was "unfair" depends in large part on what consumers properly could have expected from Orkin under the pre-1975 contracts, we focus first on those contracts. . . .

108 F.T.C. at 349 (emphasis added). In the subsection entitled "Scope of Section 5," the Commission wrote,

> Some consumer injury is inherent in any failure by a seller of goods or services to deliver according to the terms of a contract. The Commission will examine case by case whether the injury caused by a particular refusal to honor a contract obligation . . . meet[s] the Commission's standard of "unfairness" . . . .

108 F.T.C. at 360. Nothing about this opinion indicates that the Commission did anything other than that which it purported to do: apply the unfairness standard contained in its Policy Statement. The Commission's conclusion was simply that it was an "unfair" practice to breach over 200,000 contracts. We think this was a reasonable application of the Commission's unfairness standard.

[10] There remains, however, the question whether this case represents a significant departure from prior

Commission precedent. We note what has been written in a recent law review article:

> Some of the oldest "unfairness" decisions involve sellers' refusals to live up to the terms of their contract. The Commission has often challenged sellers for traditional breaches of contract: failure to fill orders, delivery of inferior merchandise, refusal to return goods taken for repair, or refusal to return promised deposits. Recent trade regulation rules have focused on similar issues. These action have attracted little controversy. Breach of contract has long been condemned as a matter of law, economics, and public policy.

Craswell, 1981 Wis.L.Rev. at 128-29 (citing *National Trade Publication, Inc. v. F.T.C.*, 300 F.2d 790 (8th Cir.1962); *In re Moye*, 50 F.T.C. 926 (1954); *In re Interstate Home Equipment Co. Inc.*, 40 F.T.C. 260 (1945); *In re Zlotnick the Furrier, Inc.* 48 F.T.C. 1068 (1952)). Orkin claims the statements in this article are erroneous, for each of the cases cited therein involved some sort of deceptive practice. We think it important to remember, however, that section 5 by its very terms makes deceptive and unfair practices distinct lines of inquiry which the Commission may pursue. As is suggested above, while a practice may be both deceptive and unfair, it may be unfair without being deceptive. *See A.F.S.*, 767 F.2d at 971; *c.f.* Averitt, 70 Geo.L.J. at 265 (deception "is really just one specific form of unfair consumer practice"). Furthermore, the Commission has explained in its Policy Statement that it operates under the assumption that the unfairness doctrine "differs from, and supplements, the prohibition against consumer deception." H.R. Rep.

156, Pt. 1, 98th Cong., 1st Sess. 34 (1983); Trade Reg. Rep. (CCH) ¶ 50,421 at 55,946.

An adoption of Orkin's position would mean that the Commission could never proscribe widespread breaches of retail consumer contracts unless there was evidence of deception or fraud. The Supreme Court has, on more than one occasion, recognized that the standard of unfairness is "by necessity, an elusive one," which defies such a limitation. *See Indiana Federation of Dentists,* 106 S.Ct. at 2016 (citing *Sperry & Hutchinson,* 405 U.S. at 244, 92 S.Ct. at 905). The statutory scheme at issue here "necessarily gives the Commission an influential role in interpreting section 5 and in applying it to facts of particular cases arising out of *unprecedented situations.*" *F.T.C. v. Colgate-Palmolive Co.,* 380 U.S. 374, 385, 85 S.Ct. 1035, 1042, 13 L.Ed.2d 904 (1965) (emphasis added). Accordingly, as the D.C. Circuit has observed,

> the Commission has, for all practical purposes, been left to develop its unfairness doctrine on an incremental, evolutionary basis. At this juncture, it is not for this court to step in and confine, by judicial fiat, the Commission's unfairness authority to acts or practices found to be deceptive or coercive. Our role is simply to review the Commission's exercise of its unfairness authority in this case.

A.F.S., 767 F.2d at 982 (citations omitted). This case may be "unprecedented" to the extent it concerns nondeceptive contract breaches. But given the extraordinary level of consumer injury which Orkin has caused and the fact that deceptiveness is often not a component of the unfairness inquiry, we think the limitation of the

Commission's section 5 authority urged by Orkin would be inconsistent with the broad mandate conferred upon the Commission by Congress. Thus, because the Commission's decision fully and clearly comports with the standard set forth in its Policy Statement, we conclude that the Commission acted within its section 5 authority.

V

[11, 12] Orkin's final argument is that the Commission erred in declining to consider evidence that it relied, in good faith, upon advice of counsel when it decided to increase its annual renewal fees. The company's position on this point derives from its renewed exegesis of the Commission's characterization of Orkin's conduct as the "implement[ation]" of a "systematic program." According to Orkin, because the Commission used these words, it necessarily found that Orkin "knowingly and willfully" breached its pre-1975 contracts. Because Orkin presented evidence that it had relied on the advice of counsel, it insists that a summary disposition was inappropriate. *See Irwin v. United States,* 558 F.2d 249, 252 (5th Cir.1977) (summary judgment improper where there is genuine factual issue as to party's state of mind).

As our discussion above indicates, we think it clear that the Commission did not base its decision on any supposed finding that Orkin had acted willfully. More important, however, is the fact that Orkin's reliance upon counsel—a fact we assume—is irrelevant to an action brought pursuant to section 5. The unfairness standard, focusing as it does upon consumer injury, does not take into account the mental state of the party accused of a section 5 violation. "The purpose of the Federal Trade Commission Act is to protect the public, not punish the

wrongdoer. . . ." *Regina Corp. v. F.T.C.*, 322 F.2d 765, 768 (3d Cir.1963). Consequently, the "Commission has traditionally focused on the effects of conduct in order to afford the most protection possible for the public." *International Harvester*, 104 F.T.C. at 1085. In earlier cases concerning the use of deceptive advertising, courts held that proof of a party's intent has no bearing on the question whether a section 5 violation has occurred. *See Regina Corp.*, 322 F.2d at 768; *Koch v. F.T.C.*, 206 F.2d 311, 317 (6th Cir.1953). The Commission interprets its authority accordingly. *See, e.g., International Harvester*, 104 F.T.C. at 1085 (Commission may prohibit injurious conduct even if carried out in good faith). Given that a practice may be deceptive without a showing of intent to deceive, it is apparent that a practice may be found unfair to consumers without a showing that the offending party intended to cause consumer injury. Orkin has referred us to no authority, and we have found none, which indicates otherwise. As the Commission noted, Orkin's reliance upon legal advice is simply not germane to the question whether Orkin's conduct was unfair within the meaning of section 5. *See* 108 F.T.C. at 359.

VI

For the foregoing reasons, we AFFIRM the Commission's cease and desist order. Upon affirming a Commission cease and desist order, a court of appeals must "issue its own order commanding obedience to the terms of such order. . . ." 15 U.S.C. § 45(c). The Commission's order is hereby ENFORCED.

In spite of the court's enforcement of the Commission's cease and desist order, under the terms of the

APPENDIX C

(Filed September 19, 1988)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-8285

ORKIN EXTERMINATING COMPANY, INC.,
Petitioner,

versus

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Review of an order of the
Federal Trade Commission

On Petitions for Rehearing and Suggestions of Rehearing In Banc

(Opinion July 15, 11 Cir., 1988, ... F.2d .....).

(September 19, 1988)

Before VANCE and CLARK, Circuit Judges, and GARZA*, Senior Circuit Judge.

PER CURIAM:

(√) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active

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*Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

APPENDIX D

Relevant Statute

Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1985), provides in pertinent part:

> (a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
>
> (2) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

FTCA, Orkin is not subject to section 5's enforcement provisions until that order becomes "final." *See* 15 U.S.C. § 45(*l*) (penalties for violation of Commission orders; district court injunctions); 15 U.S.C. § 45(m) (civil actions for recovery of penalties). In this case, the Commission's order will not become final until (1) the period allowed for filing a petition for certiorari lapses; (2) a petition for certiorari filed by Orkin is denied; or (3) thirty days after the issuance of the Supreme Court's mandate, if the Supreme Court affirms or dismisses the petition for review. *See* 15 U.S.C. § 45(g).

Thus, if Orkin decides to appeal our decision, it will be free to collect inflated renewal fees for some time unless this court issues an order enjoining the company from so doing. *See* S. Kanwit, *Federal Trade Commission* § 9.04 at 9-9 (1987). Our authority to issue such an order is clear under section 5:

> Upon . . . filing of [a] petition [for review of a Commission cease and desist order] . . . the court [of appeals] shall have . . . power to make and enter a decree affirming, modifying, or setting aside the order of the Commission and enforcing the same to the extent that such order is affirmed *and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite.*

15 U.S.C. § 45(c) (emphasis added).

Prior to oral argument, complaint counsel for the FTC moved for an injunction pendente lite to prohibit Orkin from violating the terms of the Commission's cease and desist order. A panel of this court ordered that the motion be carried with the case. Because we have now con-

cluded that an injunction is necessary to protect the parties to pre-1975 contracts from the collection of the increased annual renewal fees, we GRANT the FTC's motion for an injunction. Orkin is hereby enjoined from violating the terms of the Commission's cease and desist order. This injunction shall remain in effect until the Commission's order becomes "final" under the terms of the FTCA.

Supreme Court, U.S.
FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-710

In the Supreme Court of the United States

OCTOBER TERM, 1988

ORKIN EXTERMINATING COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Trade Commission had authority under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), to condemn as an "unfair * * * act[ ] or practice[ ]" the refusal by petitioner to honor more than 200,000 contracts with individual consumers, promising those consumers that petitioner would provide specified termite control services each year at a fixed annual fee.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A211-A249) is reported at 849 F.2d 1354. The opinion and final order of the Federal Trade Commission (Pet. App. A136-A210) and the initial decision of the administrative law judge (Pet. App. A3-A135) are reported at 108 F.T.C. 263.

JURISDICTION

The corrected judgment of the court of appeals was entered on July 15, 1988. A petition for rehearing was denied on September 19, 1988 (Pet. App. A250). The petition for a writ of certiorari was filed on October 28, 1988. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a national provider of pest control and exterminating services (Pet. App. A138, A216). Petitioner typically contracts with consumers to provide termite control services by means of standard printed forms that are not subject to modification by petitioner's agents or customers (*id.* at A216).

In 1966, petitioner began to offer what it called "lifetime" guarantees of continued protection for structures treated for termite infestation. Between January 1966 and February 1, 1975, petitioner's contracts for termite protection and control (the pre-1975 contracts) provided that a customer who had obtained initial inspection and (if needed) treatment for termite infestation could obtain subsequent annual reinspection (and necessary treatment) by paying a fixed annual renewal fee, the amount of which was specified in the contract (Pet. App. A217).

Petitioner's contracts promised to provide that protection for the "lifetime" of the treated structure, unless it was structurally modified (Pet. App. A217-220). Moreover, as petitioner indicated in a 1968 advertising campaign promoting the program, "[t]he yearly premium for this lifetime protection *is very modest and never increases*" (*id.* at A220 (emphasis in original)).

In August 1980 petitioner began notifying more than 207,000 parties to pre-1975 contracts that the company was going to increase its annual renewal fees. Annual fees were raised to a minimum of $25 or by 40%, whichever was greater (Pet. App. A222).

In the face of complaints by customers throughout the country and officials in 17 states, who protested petitioner's attempt to alter the terms of its contracts, petitioner developed what it called an "accommodation program." In addition to rolling back increases for customers

who had entered into contracts in 1968, when petitioner's advertising material specifically guaranteed that there would be no price increases, the accommodation program also permitted representatives of petitioner to rescind increases for other customers who complained about the increases with sufficient precision and tenacity. See Pet. App. A222-224.

As of August 1984, petitioner had, through its "accommodation program," rolled back the renewal fees of 21,500 customers, approximately 16,000 of whom were 1968 customers. Also, more than 42,000 customers had canceled pre-1975 contracts for reasons the record does not reveal. Pet. App. A225. As of August 1, 1984, however, petitioner was still collecting increased annual renewal fees from more than 140,000 customers with pre-1975 contracts and had received increased revenues through 1984 of $7,515,674 (Pet. App. A51, A222).

2. In May 1984, the Federal Trade Commission (Commission) issued an administrative complaint alleging that petitioner's unilateral breach of scores of thousands of consumer contracts constituted an "unfair * * * act[ ] or practice[ ]" in violation of Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. (& Supp. IV) 45. Following pretrial discovery, Commission "complaint counsel" moved for a summary decision pursuant to Section 3.24 of the Commission's Rules of Practice, 16 C.F.R. 3.24(a). Petitioner filed a cross-motion for summary decision. Pet. App. A225.

The administrative law judge (ALJ) ruled in the Commission's favor. He found that petitioner's pre-1975 contracts did provide for a fixed renewal fee and that petitioner had breached those contracts by increasing the renewal fees. Pet. App. A225. To determine whether petitioner's conduct constituted an unfair act or practice, the ALJ then applied the Commission's three-part test for

finding unfairness.[1] He concluded (1) that petitioner's unilateral breach of thousands of consumer contracts caused substantial consumer injury; (2) that consumers could not reasonably have avoided the injury; and (3) that there were no countervailing benefits to consumers or competition from the challenged conduct. The ALJ's order required petitioner to roll back all fees in pre-1975 contracts to the levels specified in those contracts. Pet. App. A225-A226. On appeal by petitioner, the Commission affirmed the ALJ's decision in all respects (*id.* at A226).

3. On petitioner's petition for review, the court of appeals affirmed and enforced the Commission's order.[2] The court rejected "[petitioner's] suggestion that [its pre-1975 contracts] are silent as to the duration of the stated annual renewal fees" (Pet. App. A230). Rather, the court sustained the Commission's conclusion that petitioner's pre-1975 contracts unambiguously promised lifetime treatment of covered structures at a fixed renewal fee that would not be increased (*id.* at A226-A233).

The court of appeals next reviewed the Commission's application of its three-part test for unfairness. The court concluded that the Commission had properly found that the undisputed facts of this case amply satisfied that test. First, the court noted that by unilaterally breaching more

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[1] The test is as follows (Pet. App. A236):

> To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.

See also *American Financial Services Ass'n* v. *FTC*, 767 F.2d 957, 970-971 (D.C. Cir. 1985), cert. denied, 475 U.S. 1011 (1986).

[2] The court issued its opinion on April 19, 1988, and issued a corrected opinion on July 15, 1988. The court's opinion of July 15, 1988, is the one summarized below.

than 200,000 consumer contracts, and collecting amounts in excess of the specified rate on more than 140,000 of those contracts, petitioner had realized more than $7 million to which it was not contractually entitled. Although the loss to each individual consumer was small, the aggregate consumer injury was substantial. Pet. App. A238.

The court also noted that the Commission had concluded that petitioner's unilateral breach of contract provided no countervailing benefits to consumers or competition, because the breach had been unaccompanied by any increase in or enhancement of the services provided to consumers. Petitioner did not challenge that conclusion. Pet. App. A239.

Finally, the court affirmed the Commission's conclusion that consumers could not reasonably avoid the substantial injury caused by petitioner's conduct. The court noted that "[a]nticipatory avoidance through consumer choice was impossible because these contracts give no indication that the company would raise the renewal fees as a result of inflation, or for any other reason" (Pet. App. A240). The court also noted that mitigation of the injury was infeasible because the company's "accommodation program" was not made known to consumers and was available only to those who affirmatively complained about the increase. Likewise, consumers could not mitigate damages by transferring their business to competitors of petitioner because such competitors (who would not have received the economic benefit that petitioner received from making the initial inspection and treatment of a house) would not be willing to offer consumers renewal terms equivalent to those in the contract with petitioner. *Id.* at A240-A241.

Having found that the record supported the Commission's conclusion that its test for unfairness was satisfied, the court then considered petitioner's contention that application of the unfairness standard was improper. The

court held that "[t]he Commission's conclusion * * * that it was an 'unfair' practice to breach over 200,000 contracts * * * was a reasonable application of the Commission's unfairness standard" (Pet. App. A243).

The court noted that the FTC Act expressly prohibits both "unfair" and "deceptive" acts and practices, so that it was not necessary to show deception in petitioner's conduct in order to establish a statutory violation (Pet. App. A244, A246-A247). The court concluded that although this case, with its focus on non-deceptive contract breaches, "may be unprecedented," denial of the Commission's authority to stop the practice "given the extraordinary level of consumer injury which [petitioner] has caused * * * would be inconsistent with the broad mandate conferred upon the Commission by Congress" (*id.* at A245-A246).

In addition to affirming and enforcing the Commission's order, the court of appeals entered an injunction pendente lite pursuant to Section 5(c) of the FTC Act, 15 U.S.C. 45(c), requiring petitioner to desist from implementing further fee increases in violation of the Commission's order, until such time as the order becomes final.[3]

ARGUMENT

The decision of the court of appeals comports with the precedents of this Court and other courts of appeals, recognizing that Congress intended to accord the Commission broad flexibility in construing the meaning of "unfair acts or practices." The Commission reasonably applied its unfairness authority in this case to require that petitioner honor a contractual promise it had made to more than

[3] Commission orders do not become final until all judicial review is complete (see 15 U.S.C. 45(g)).

200,000 consumers. There is no reason for this Court to review the judgment of the court of appeals upholding the Commission's order.

As this Court has repeatedly recognized, Congress deliberately cast the prohibitions of Section 5 of the FTC Act in flexible terms so that the Commission could address the " 'many and variable unfair practices which prevail in commerce.' " *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 367 (1965) (quoting S. Rep. 597, 63d Cong., 2d Sess. 13 (1914)); see also *FTC* v. *R.F. Keppel & Bro.*, 291 U.S. 304, 310-311 (1934). Considering the deference that is due an agency's construction of its statute (see, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984)), it is not surprising that the Court has cited with apparent approval an earlier administrative definition of "unfair acts or practices" (*FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244-245 n.5 (1972)). The Commission's current three-part test is simply a refinement of that test.[4] It has been applied by other courts of appeals. See *American Financial Services Ass'n* v. *FTC*, *supra*; *Harry & Bryant Co.* v. *FTC*, 726 F.2d 993, 999-1000 (4th Cir.), cert. denied, 469 U.S. 820 (1984). Neither Congress nor any court has suggested that the test misinterprets the FTC Act.[5]

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[4] The Commission's 1964 test for unfairness specified that a practice must meet at least one (but not necessarily all) of the three criteria. Consumer injury was one of the criteria, but the test as then formulated did not explicitly require a showing that the injury was unavoidable, or explicitly require a weighing of the countervailing benefits to competition. It was to allay concern about the potential breadth of the 1964 standard that the Commission formulated the narrower test that was applied in this case. See *American Financial Services Ass'n* v. *FTC*, 767 F.2d at 970-971.

[5] Both Houses of Congress, in fact, have passed bills that would have codified this test, but for reasons unrelated to their definitions of "unfair acts or practices" those bills did not become law. See S. 1078, 99th Cong., 1st Sess. (1985); 131 Cong. Rec. 20765 (1985); H.R. 2385,

Although petitioner suggests that the three-part test applied by both the Commission and the courts of appeals is improper insofar as it results in condemnation of a company's breach of a consumer form contract, petitioner cites no authority for that position. In fact, as the court of appeals observed (Pet. App. A244 (citation omitted)), "[s]ome of the oldest 'unfairness' decisions involve sellers' refusals to live up to the terms of their contract." And even if the Commission has not previously considered the precise type of contractual breach at issue here, petitioner does not even acknowledge the extensive precedent supporting the Commission's authority to refine the concept of "unfair practices" on an incremental basis to address the wide and ever-changing array of potentially injurious trade practices.

As the court of appeals recognized, in this case the Commission "simply [held] that it was an 'unfair' practice to breach over 200,000 contracts" where most consumers were essentially remediless and received no countervailing benefits (Pet. App. A243). Insofar as the court of appeals' opinion establishes that the Commission may act in other instances where companies breach thousands of consumer form contracts at a cost of millions of dollars to consumers, and where no reasonable means exist by which

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99th Cong., 1st Sess. (1985); 131 Cong. Rec. H7503 (daily ed. Sept. 17, 1985); *House Passes, With No Fanfare, FTC's Authorization Bill With Legislative Veto,* 49 Antitrust & Trade Reg. Rep. (BNA), No. 1232, at 483, 485 (Sept. 19, 1985); S. 677, 100th Cong., 1st Sess. (1987); 133 Cong. Rec. S4795 (daily ed. April 8, 1987); H.R. 2897, 100th Cong., 1st Sess. (1987); 133 Cong. Rec. H8276-H8277 (daily ed. October 7, 1987); *Hill Staffs Agree on Some Issues in FTC Reauthorization Legislation,* 54 Antitrust & Trade Reg. Rep. (BNA), No. 1372, at 1143-1144 (June 30, 1988).

consumers may avoid such injury,[6] petitioner does not suggest why such a result is either legally wrong or undesirable as a matter of policy.

Finally, petitioner overstates matters considerably in contending that the court's ruling "exposes all businesses which use consumer form contracts to the threat of * * * severe penalties under federal law for any breach of these contracts" (Pet. 9). This case did not involve just "any breach" of a consumer contract, and any precedent it establishes is clearly qualified by the facts on which the factual finding of unfairness was based. Moreover, the order of which petitioner seeks review requires only that it desist from further overcharging its customers in violation of their contracts, and that it rescind unilateral increases previously imposed in violation of contract terms (Pet. App. A204-A210).[7] Such an order is hardly the kind of precedent that requires this Court's intervention in the absence of any decisional authority to support petitioner's position.

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[6] According to petitioner, the Commission "close[d] its eyes" (Pet. 9) to evidence that means of avoidance were available to consumers. In fact, the Commission carefully considered the evidence (Pet. App. A180-A183). Insofar as petitioner objects to the uniform factual conclusions of the Commission and court of appeals on this point, its request for certiorari contravenes the principle that this Court " 'will intervene only in what ought to be the rare instances when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied.' " *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 523 (1981) (quoting *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951)).

[7] Should the Commission wish to make petitioner pay back the more than $7 million it has previously collected by dishonoring its contracts or obtain any other relief in the nature of damages, it will be required, as petitioner acknowledges (Pet. 9-10 n.3), to demonstrate in a district court action that petitioner's conduct was that "which a reasonable man would have known under the circumstances was dishonest or fraudulent" (15 U.S.C. 57b(a)(2)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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